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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1929

No. 248

VICTORIO NOGUEIRA, PETITIONER,

vs.

THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED JULY 15, 1929

CERTIORARI GRANTED OCTOBER 21, 1929

(34,379)

(34,379)

SUPREME COURT OF THE UNITED STATES

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[fol. a-1]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

L 41-311

VICTORIO NOGUEIRA, Plaintiff,

against

THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY, Defendant

NOTICE OF APPEAL

SIRS: Please take notice that Victorio Nogueira, the plaintiff herein, hereby appeals to the United States Circuit — of Appeals, for the Second Circuit, at the next Term thereof, to be held at the Court House, Post Office Building, Borough of Manhattan, City of New York, from the judgment entered in the office of the Clerk of the Court on the 17th day of July, 1928, dismissing the plaintiff's complaint, and from each and every part, as well as the whole thereof.

Dated N. Y., July 25th, 1928.

Yours, etc., Sansone & Gelb, Attorneys for Plaintiff.
Office & P. O. address: No. 233 Broadway, Borough of Manhattan, New York City.

To John M. Gibbons, Esq., Attorney for Defendant, Room 3841, Grand Central Terminal, Borough of Manhattan, New York City; Alex Gilchrist, Jr., Clerk of the United States District Court, Southern District of New York.

[fol. 2] Summons, in usual form, omitted in printing.

[fol. 3] IN UNITED STATES DISTRICT COURT

COMPLAINT

Plaintiff herein through his attorneys, Sansone & Gelb, complaining of the defendant, alleges:

1. Upon information and belief that at all times hereinafter mentioned the defendant was and still is a corporation duly organized and existing under and by virtue of the laws of the State of Connecticut, and maintains an office and place of business in the City and State and Southern District of New York.

2. That at all times hereinafter mentioned the defendant owned, operated and controlled a certain system of railroad transportation and controlled a certain system of float and tug boat transportation, operating the same for the carrying of passengers and freight from and between the States of New York and Connecticut, and by reason thereof was engaged in what is commonly known as interstate commerce.

3. That at all times hereinafter mentioned plaintiff was employed by the defendant as a laborer and freight handler.

4. That heretofore and on or about the 13th day of October, 1927, plaintiff was employed as a laborer and freight handler at or near Pier 42 on a dock of the defendant company and on or near a float of the defendant company moored to said dock at Pier 42, East River, in the Borough of Manhattan, City and State of New York.

5. That at the time and place above mentioned plaintiff was engaged in loading and handling freight destined to [fol. 4] points outside of the State of New York and was assisting in the loading of such freight on to a float of the defendant company, which float contained freight destined to points outside the State of New York, and by reason of which fact was engaged in what is commonly known as interstate commerce.

6. That at all times herein mentioned there was and still is in full force and effect a general statute of the United States of America, being Chapter 149 of the Laws of 1908, as amended by Act of Congress approved April 5th, 1910 and known as "An Act Relating to Liability of Common Carriers by Railroad to their Employees in Certain Cases," which statute is binding upon the plaintiff and defendant herein.

7. That at the time and place above mentioned while the plaintiff was engaged in his duties as a freight handler and

while he was in the act of moving or loading a bale, bundle, parcel or piece of freight on to the float of the defendant company through the negligence and carelessness of the defendant, its agents, servants and employees, the said bale, bundle, parcel or piece of freight and the hand truck upon which the same was loaded, were caused to come in violent contact with the plaintiff's body, inflicting serious personal injuries upon him.

8. That the said accident and consequent injury to the plaintiff was brought about through the negligence and carelessness of the defendant, its agents, servants and employees in that they failed to provide plaintiff and his co-workers with adequate tools, appliances and equipment for the safe and proper conduct of the work then and there in hand; in that they conducted the work in a dangerous and improper manner; in that the method adopted for the work [fol. 5] was dangerous and unsafe in view of the surrounding circumstances; in that they failed to provide plaintiff with a sufficient number of competent and skilled co-workers for the safe conduct of the work then in hand; in that they failed to properly instruct the plaintiff and his co-workers as to the safe and proper method in which the work should have been safely conducted; in that they had in charge of the work a foreman or supervisor who was unskilled in the direction of the work then in hand; in that they failed to promulgate and enforce suitable and proper rules and regulations governing the work then in hand to the end that the accident such as occurred could have been avoided; and in that they failed to provide the plaintiff with a reasonably safe place in which to work; and in that plaintiff's co-workers who were engaged in assisting him in the moving of the bale, bundle, parcel or piece of freight failed to exercise due care and regard for the safety of the plaintiff, and conducted themselves in a reckless and careless manner in the handling of the said bale, bundle, piece or parcel of freight at the time and place of the accident.

9. That said accident and consequent injury to the plaintiff was occasioned wholly and solely by reason of the negligence of the defendant.

10. That by reason of said accident plaintiff was caused to be made sick, sore, lame and disabled; he received serious

injuries to his head, arms, legs and body; he received a severe shock to his nervous system and was caused to suffer great pain and mental anguish; that he has been, and in the future will be required to undergo medical treatment in an effort to be cured of or lessen the effects of his injuries; that he has been and in the future will be prevented from [fol. 6] attending to his usual occupation from which he derived a livelihood, and that all of said injuries are, as plaintiff is informed and verily believes, of a permanent nature.

11. That by reason of the premises plaintiff has been damaged in the sum of Twenty Thousand ($20,000) Dollars.

Wherefore plaintiff demands judgment against the defendant in the sum of Twenty Thousand ($20,000) Dollars, besides the costs and disbursements of this action.

Sansone & Gelb, Attorneys for Plaintiff. Office & P. O. address: 233 Broadway, Borough of Manhattan, New York City.

Duly sworn to by Victorio Nogueira. Jurat omitted in printing.

[fol. 7] IN UNITED STATES DISTRICT COURT

ANSWER

The defendant above named, by its attorney, John M. Gibbons, for it answer to the complaint herein:

First. Admits that at all times hereinafter mentioned the defendant owned, operated and controlled a certain system of railroad transportation and controlled a certain system of float and tugboat transportation, as alleged in paragraph designated "2" of the complaint herein; and denies that it has any knowledge or information sufficient to form a belief as to the truth of any of the other allegations contained in said paragraph designated "2" of the complaint herein.

Second: Denies that it has any knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in paragraphs designated "5," "6" and "10" of the complaint herein.

Third. Denies upon information and belief, each and every allegation contained in paragraphs designated "7," "8," "9" and "11" of the complaint herein.

For a separate answer and defense, the defendant alleges, upon information and belief:

First. That whatever injuries the plaintiff may have received at the time and place mentioned in the complaint [fol. 8] herein resulted from his failure to exercise due care and diligence in the performance of his duties, his own negligence and carelessnes contributing thereto.

For a second separate answer and defense, the defendant alleges, upon information and belief:

First. That whatever damages or injuries the plaintiff sustained at the time and place mentioned in the complaint herein were sustained while he was at work in an employment which he entered knowing the risk thereof, and assumed the same by entering into and continuing said employment.

Wherefore the defendant demands judgment dismissing the complaint herein, with costs.

John M. Gibbons, Attorney for Defendant. Office and Post Office address: Room 3841, Grand Central Terminal, New York City.

Duly sworn to by Frank E. Hall. Jurat omitted in printing.

[fol. 9] IN UNITED STATES DISTRICT COURT

PLAINTIFF'S BILL OF PARTICULARS

Plaintiff submits the following as and for his Bill of Particulars herein:

1. Plaintiff received fractures of the upper and outer end of the right tibia, the line of fracture extending to the knee joint, and a fracture of the upper end of the right fibula about two inches from the tip with considerable deformity at the site of fracture. Also an oblique fracture

at the junction of the upper and middle third of the tibia with marked overlapping and external angulation, resulting in marked swelling and thickening about the knee joint with loss in flexion. Also marked visible external bowing at the site of fracture; as a result of these fractures, plain-
[fol. 10] tiff's right leg is one and one-half inches shorter than the left leg. The right angle is swollen and restricted in motion. That as a result of these injuries plaintiff has suffered and is suffering pain in his leg; is prevented from having the free use thereof because of the stiffness in the leg, knee and ankle.

2. All the injuries above set forth are permanent in nature.

3. Plaintiff has not yet received a bill for medical care and for medicines and is unable at this time to give the amount thereof.

4. Plaintiff was confined to a hospital from the date of the accident, namely October 13th, 1927 to December 7th, 1927. He was thereafter confined to his bed at home until November 29th, 1927 and subsequently confined to his home for a period of approximately four weeks.

5. Plaintiff was employed as a freight laborer or freight handler and has been prevented from attending to his occupation since the date of the accident. That his average weekly earnings were $27.00.

6. The negligence of the defendant consisted of the following: The fellow servants of the plaintiff who assisted him in loading the bale, bundle or piece of freight on to the float of the defendant company failed to hold on to the said bale while the same was being moved on a truck which the plaintiff was handling, and carelessly permitted the bale of freight together with the truck, to get out of their control and to fall upon the plaintiff's leg. They let go of the said piece of freight without warning the plaintiff that they were doing so and caused the same to strike him without giving him an opportunity to reach a position of safety. The defendant was further negligent in that it failed to supply the plaintiff with suitable and adequate
[fol. 11] equipment by the use of which the draft being

handled at the time of the accident could have been moved with safety. Defendant was further negligent in that it adopted and pursued a dangerous and unsafe method of moving freight such as was being moved at the time of the accident. Defendant was further negligent in that it failed to adequately supervise the work then and there being done and in that it supplied a foreman or supervisor in charge of the work wholly unsuited and unfit for the work then and there being done.

7. The information herein sought has heretofore been given.

8. The information herein sought has heretofore been given.

9. No claim made in this regard.

10. The place furnished the plaintiff was rendered unsafe by reason of the negligence of the defendant as alleged in paragraph 6 above.

11. The fellow servants of the plaintiff improperly handled the bale or piece of freight; they conducted themselves in an imprudent manner and paid no attention to the safety of the plaintiff while they were assisting him in the movement of the piece of freight; they permitted the said bundle or piece of freight to get out of their control and to come in violent contact with the plaintiff.

12. The information herein sought has heretofore been given.

Sansone & Gelb, Attorneys for Plaintiff. Office & P. O. address: 233 Broadway, Borough of Manhattan, New York City.

[fol. 12] *Duly sworn to by Victorio Nogueira. Jurat omitted in printing.*

[fol. 13] IN UNITED STATES DISTRICT COURT

JUDGMENT

The issues in this action having been brought on for trial before Hon. Walter C. Lindley and a jury at a Stated

Term of this Court on the 11th day of July, 1928, at the Court Rooms thereof, in the Post Office Building, New York City; and plaintiff and defendant having appeared by counsel, and the allegations and proof on the part of the plaintiff having been heard and considered; and the Court having dismissed the complaint at the end of the plaintiff's case; and the costs of the defendant, The New York, New Haven and Hartford Railroad Company, having been taxed at the sum of Thirty Dollars ($30-00/100);

Now, on motion of John M. Gibbons, attorney for the defendant, The New York, New Haven and Hartford Railroad Company, it is

Ordered, ajdudged and decreed that the defendant, The New York, New Haven and Hartford Railroad Company, have judgment against the plaintiff, Victorio Nogueira, in amount of Thirty Dollars ($30-00/100), costs as taxed herein, and that the defendant, The New York, New Haven and Hartford Railroad Company, have execution therefor.

Dated New York, July 17th, 1928.

Alex Gilchrist, Jr., Clerk.

[fol. 14] In United States District Court, Southern District of New York

Before Hon. Walter C. Lindley, J., and a Jury

Case

New York, July 11, 1928.

Appearances of Counsel

Sansone & Gelb, Attorneys for Plaintiff, by Anthony Sansone, of Counsel.

John M. Gibbons, Attorney for Defendant, by E. R. Brumley, of Counsel.

A jury was impaneled and sworn.

Opening for Plaintiff

Mr. Sansone: May it please the Court, gentlemen of the jury: As stated to you by his Honor, this is an action

brought by Mr. Nogueira against the New York, New Haven & Hartford Railroad to recover damages which he sustained while in its employ. This accident occurred on the 13th day of October, 1927, and it occurred at Pier 42, East River. At the time of this accident the plaintiff was a member of a gang of men whose job it was to handle freight upon the docks and move it from the docks to the floats; you have all seen these car floats at some time or other. The floats come right in and the cars stay on the float and this man, and the rest of his gang, were engaged in getting freight from the dock to the cars. Upon this occasion they were engaged in loading merchandise which consisted of bales of paper, bales of paper which were consigned from [fol. 15] the State of New York to the State of Connecticut. The defendant was engaged in doing this kind of work which is called interstate commerce. Being engaged in that kind of work, we claim that he is entitled to the provisions of the Federal Employers' Liability Act. That act covers the duties and responsibilities of a railroad company who is engaged in working and carrying of interstate commerce, the handling of freight going out of the State. That act covers the duties and responsibilities of a railroad company toward the men who are engaged in working in interstate commerce. I mention that at this time because under the provisions of that act the duties and responsibilities of a railroad company towards its employees such as this man, are considerable, and they are far different than they were under the old law before that was passed, and in that connection I am going to ask you particularly not to form any opinion as to the law, or who is at fault, because under the common law as you will know, if the man is careless himself there could be no recovery if he was hurt there through carelessness, on the part of one of the other men working there, there could be no recovery, the only grounds that he could recover on is a defective place or unsafe place to work, so I will ask you to wait until you hear his Honor's charge upon it before you pass upon the facts.

Now on the day of the accident they were loading bales of paper, weighing something over a thousand to twelve hundred pounds, and in order to get that paper on the float they use these ordinary handtrucks. You have all seen them. Some of the men were working on the dock and

some of the men were working on the floats, waiting for [fol. 16] this cargo to be brought over, and then these men on the floats would store it inside the freight cars.

The morning that this man and his gang went to work they were on a different pier and working there until about four o'clock, I think they were on Pier 37 or 38, I am not sure, but I think that is what it was, but about four o'clock they went to Pier 42, it seems that the gang that had been working at that pier had quit earlier than is usual, at least they quit earlier than this other gang. They were ordered, when they got there, to this Pier 42, to start loading these bales of paper. At the time that they got there, at the time that this accident happened, the tide was pretty near low, nearly all the way down I believe, and with the tide in that condition the place of the float where they ran off the bales is quite, or was quite a bit below the dock on which these bales of paper were stored, and in order to get from the dock down to the float, they had a plank, approximately five or six feet wide, and about, I should say, ten feet long. I think the testimony will be that at the time of this accident that the part of the float to which this plank was raised was some four and one half to five feet lower than the dock on which the paper was stored, with the result that it became necessary to take these 1,200-pound bales of paper down, down that 10-foot plank at an angle of something like four and a half or five feet.

Now the work was supposed to be carried on under the usual practice, and the practice had been and was on this day that when they had the condition of a low tide, and a heavy load, such as they had on this day, that the man who is handling the handtruck, such as this plaintiff was, on this day, that he was to have some help. Of course that [fol. 17] was quite a big drop. If it had not been such an angle, if it had been nearly level, or level, he could have handled it alone, or if there was just a little bit of a drop, several inches, that might be a little help to him, but it had been the practice, and a reasonable and precautionary one that with the tide in the condition that it was on this day, low, that the man who had a heavy load to handle, these 1,200-pound bales of paper, that that man was to have help in getting it down, he was to have help holding that back, holding it back so that it would not push him right off the float, and run over him, because it was physically im-

possible for one man to handle it while the tide was in that condition. Of course, under other conditions probably he could, but with the conditions as they were on that day he could not.

Just before they went down the plank, they would stop right at the top before they started down. This man did just that on the day of the accident. They got there around four o'clock or a little after and this bale was the first one to go down. The first one he took down, so when he got to the head of that plank he called to the men telling them that he was ready to go down, and the men came, I think two men came to him, and a couple more from the dock, and they were supposed to hold it back, they were supposed to hold it back, you know they had these big freight hooks and they hook them into the bales of paper. They yanked right into it, deep in it to make sure that they have something that will hold, they were handling paper you know, and so these men came over to help him with this load. These men were to get their hooks into the big bale and hold it back, and [fol. 18] that was their duty to hold it back, so he started to go down. It seemed that with the tide in that condition this plank that came up just projected up a little from the top, with the result that in order to make the space smooth, they had a great big piece of steel or iron and they would bring it up. Well, anyway, he started down and just about the time that he started down it pushed him right down, nobody seemed to be holding it back. After it pushed him down, first started down, the front handles he was holding came up, with the result that it pushed him right down, and finally pushed him down to the float, with the load on the handtruck overturning and both of them hitting him. It fractured his leg in two places, I think. The doctor will tell us about that. I do not think that it would be proper for me to spend any time on that now. While he was lying down there were the men who were supposed to be holding the load back with their big freight hooks, there they were with their hooks in hands on the dock, and as a matter of fact if they had been where they were supposed to be they would still be hanging right on to the paper, but the men were on the dock with the hooks in their hands, that is where they were.

We say that it was negligence on the part of these men as they were supposed to help him under the circumstances

under which this merchandise was being loaded, and they were supposed to help him under the usual circumstances that he was entitled to.

We say that this work was conducted in such a manner that when this man started down with a big load of 1,200 pounds on his handtruck, going down a plank which dropped five feet, that they should have adopted some method by [fol. 19] which that work would have been done with some degree of safety. We say that under the circumstances this railroad company is responsible for this man's injuries.

As a result of this accident, gentlemen, he was taken to a hospital. He was there for two days, and then they transferred him to another hospital where he was for a period of some weeks, just how long I do not remember, the plaintiff will tell you how long he was there. They put on a plaster cast which was on him for eight weeks I think. He was laid up for a considerable time after that, and as a result of the accident he has a shortening of the leg something like an inch and a half which causes him to walk with a limp, which will of necessity be permanent. However, we will let the plaintiff tell you about that.

Since the accident he has attempted to do a little work. He got light jobs to do, just trying to do the best that he could, but he has not been able to do his regular longshoreman work, handling 1,200-pound bales of paper. The leg is weak. Just how long it will be in that condition the doctors will have to tell you. Now he goes along with a limp, true, but he gets along nevertheless, but there is one thing, gentlemen, that leg which has shortened swells up when he walks on it. When he puts his weight on it to any degree or to any extent.

That briefly, gentlemen of the jury, is an outline of what we expect to prove to you for which we are going to ask you for your verdict. I thank you for your attention.

Mr. Brumley: If your Honor please, on the plaintiff's bill of particulars, and in the opening statement of counsel I want to move to dismiss this action on the ground that it [fol. 20] appears that this Court has not got the jurisdiction, and on the ground that it appears that the United States Longshoremen's & Harbor Workers' Compensation Commission applies to this kind of a case and is exclusive, and that the Federal Employers' Liability Act, under which

this action purports to be brought, does not apply. Also on the ground that the plaintiff had brought the wrong remedy and that the Court has not the jurisdiction of the subject matter.

The Court: I will not determine that question at this time. I will let him introduce his evidence. I want to hear what he has to say. The motion is denied.

Mr. Brumley: Exception.

The Court: I will give you a chance to present that again.

Mr. Brumley: Thank you, your Honor.

Mr. Sansone: If your Honor please, the defendant in its answer denies interstate commerce, but I think that this time they will admit that the bales of paper were consigned at this time to a point out of the state, at the time of this accident, and that the plaintiff was engaged in interstate commerce.

Mr. Brumley: The defendant admits that the bales being transported by the plaintiff was destined from New York to Connecticut.

At this time, your Honor, with your permission, I will open to the jury.

Opening for Defendant

Mr. Brumley: May it please the Court and gentlemen of the jury. I am going to be very brief, because Mr. Sansone has told you in substance the whole story. A lot of testimony will be shown that will not be disputed. For in-
[fol. 21] stance, there is no question but that this man was engaged by the New York, New Haven & Hartford Railroad Company, or that he was engaged in trucking a bale of paper, weighing about 1,100 or 1,200 pounds, from the dock, Pier 42, East River, to a car float, a railroad car which was on a float lying in the river. There is no question about that, nor is there any question but that he sustained the injuries.

There is not a very moot question as to the extent of his injuries or as to the period of his disability. That of course you will hear from the doctor, I am not going to review that part at all. I am not going to review any of the proof that we are going to give you on the man's disability.

There is going to be a dispute as to how the accident happened and why it happened. Now it has been said that the practice was under these conditions to furnish men to assist in trucking the bales down from the dock to the boat, and it was admitted, and we will prove it, that we did furnish additional help. We will prove to you that it was not the practice to do that; that the men themselves under these conditions practiced that in trucking that freight down alone. We will also show you, we believe, that under these same conditions the men trucked it down alone. Mr. Sansone did not tell you that there was a sort of a brake, and that that brake was used to assist him in taking down the truck and slowing it and guiding it. That was better than human help could be.

There were two men with hooks on the rear of the truck holding it and balancing it, holding the bales. There was no mention to you of the man who was standing right alongside of the plaintiff himself, assisting in holding the handles. [fol. 22] It was this man's job to take this truck down with the bale and at the top, he caught hold of the two handles and held on with his two hands.

Now as I understand it there was another man furnished to him who had ahold one of the handles. Back of him were two other men with bale hooks who had ahold of this bale. Now we will show you that prior to the accident on this day there were a number of bales trucked down the plank, when the tide was low, by one man, but instead of asking the plaintiff to do it alone, we came there with additional men to assist him.

Two men who had a hold with bale hooks, they did not stay at the top of the plank. They started down the plank, and the accident did not start to happen until they got half way down the plank, and then, for some reason, the plaintiff lifted up the handles, instead of holding them down, and they went up; and therefore he lost control, and then he entirely let go of the handles and the man to the right tried to hold it with one hand. Naturally under those conditions, the truck swerved over to the left. The man in the back had a hold of the bundle of paper. But, however, finally the bundle went down the plank out of control of everybody and the plaintiff himself preceded the truck and the bundle down the plank, and landed on the deck of the

float and then the truck and the bale came down and struck him causing a fracture of his leg.

Now we say that we will show that to you. We can't see where there was any failure on our part to furnish help or assistance. We will put on witnesses who assisted this man and you will find out whether they were negligent. It was an accident, gentlemen, pure and simple, and under the law it is our opinion that the defendant is not liable. That [fol. 23] was the kind of a risk that all of us assume in everything that we do in life. It was an obvious risk, an open risk, and if that be so, the defendant railroad company is not at fault. In order to hold the railroad company, you must find some angle of negligence or failure on the part of the railroad company, but anything that is assumed by the plaintiff, anything that is purely accidental, the railroad company should not be asked to pay for it. Now, this man worked in and about a dock on planks and car floats and on cars and on floats. You and I perhaps, gentlemen, working at desk work do not run into conditions such as he did, but it was in the regular line of his employment. It was dangerous, inherently so, accidents do happen and it was not the fault of anybody, and we say that this is that kind of a case, we say this is that kind of an accident. We will give you the evidence and we will ask you that unless you find that the defendant was at fault, and that the plaintiff did not assume the danger, to bring in a verdict for the defendant.

Gentlemen, I thank you for your attention.

Victorio Nogueira, the plaintiff, called as a witness in his own behalf, being duly sworn, testified as follows:

Direct examination by Mr. Sansone:

Mr. Sansone: If the Court please, this witness speaks very little English. I will have to use an interpreter for him. I attempted to get the Spanish Consul to furnish one. There is a man in the court room now that will interpret for us, with your Honor's permission.

[fol. 24] The Court: Can't the witness speak English?

Mr. Sansone: Very little. We cannot use him, your Honor, without an interpreter.

The Court: Very well; get the interpreter.

(At this time Anthony Sanchez was called and sworn to act as official interpreter.)

Q. Now, talk up, will you, please. Mr. Nogueira, you are the plaintiff—you are suing the railroad company in this case?

A. Yes, sir.

Q. How old are you, Mr. Nogueira?

A. Forty-three years of age.

Q. How long have you been in this country?

A. Eleven years.

Q. In October of 1927 were you working for the New York, New Haven & Hartford Railroad Company?

A. Yes, sir, I was.

Q. How long had you worked for the New York, New Haven & Hartford Railroad Company before that?

A. I had been working for them for about three years, at times.

Q. Did you work these three years steady or did you work some of the time and then stop and then go back to work for them?

A. I had been working for the company. Only when there is no work I look for another job and then I go back to the company again.

Q. At the time of this accident you were working on the dock, were you?

A. Yes, sir, on the dock.

Q. How long had you been working on the docks before the accident?

A. Two weeks.

Q. On the morning of the accident you were working at what pier?

A. Pier 37—38.

[fol. 25] Q. What time did you start to work there?

A. Eight o'clock in the morning.

Q. When did you leave Pier 37-38, what time of the day?

A. I left there in the afternoon.

Q. I asked you what time of the day, what time in the afternoon did you leave?

A. Between a quarter after four and half past four o'clock.

Q. Do you recall what kind of work you were doing at Pier 37—38?

A. What kind of work?

Q. Yes, what were you loading there?

A. I was working on railroad cars.

Q. What were you doing on the railroad cars?

A. Filling up the railroad cars.

Q. Filling up the railroad cars?

A. Yes, sir, I was working on the railroad cars.

Q. Storing cargo or freight that some of the other men brought there?

A. I was working there storing freight, yes, sir.

Q. Were you working there with other men?

A. Yes, sir; one man would bring it in——

Q. The other man would bring the freight into the cars, and in the interim you stored it away?

A. The machines bring them alongside the car and then we put them into the car.

Q. How many men were working in your gang at Pier 37—38?

A. It depends, six or seven on that day.

Q. Now, for the two weeks that you had worked prior to the accident, for the railroad company, had you worked around these same piers, 37—38 and 42?

A. Yes, sir, on the same dock.

Q. And before the two weeks, and during the three years that you worked for the company, had you worked around these same piers?

A. At different piers, Pier 42, 37, 38—all of them.

Q. You had been working on piers for the company right along the East River?

[fol. 26] A. Yes, sir, for the whole time on the East River on the company docks.

Q. During the two years had you worked loading floats, and on the dock too?

A. Yes, sir, sometimes on a float, sometimes on a dock.

Q. Depending on where you were employed by the for-man; is that right?

A. Sometimes the for-man put me on a dock and sometimes on a float. Yes, sir, sometimes on the dock with the cars and sometimes without the cars.

Q. I suppose that during that time sometimes you worked there when the tide was high and sometimes you worked there when the tide was low, is that right?

A. Yes, sir.

Q. And you observed and saw how the work was done during that time?

A. Yes, sir, I did.

Q. You say that around between a quarter after and four-thirty, on the day of the accident, you went from Pier 38 to Pier 42, is that right?

A. About that time I went from 38 to 42.

Q. Did your whole gang go over to Pier 42?

A. Yes, sir.

Q. How many men were you having in your gang when you got to Pier 42?

A. Seven men.

Q. You say that there were seven men in your gang when you went over to Pier 42?

A. Yes, sir, there was.

Q. All came with you from Pier 37—38?

A. Yes, sir.

Q. Did you have a for-man in your gang?

A. Yes, sir.

Q. Do you know what his name was?

A. No, sir.

Q. Did he take the gang over to the other pier, Pier 42?

A. Just what do you mean?

Q. Did the for-man take the gang over, did you all go over with the for-man to Pier 42?

A. Yes, sir.

[fol. 27] Q. Now when you got over to Pier 42 were there any men working on the pier?

A. There was a gang there at that time, but they were going out when we got to 42.

Q. The other gang was coming out at that time?

A. Yes, sir.

Q. Well, did they wait until you came and then go away or did they go away before?

A. I saw the other gang go out when we got in to Pier 42.

Q. Well, now, when you got to Pier 42, was there any freight there to be loaded on the float?

A. There was a big truck loaded with bales of paper, big bales of paper.

Q. Was the truck right on the pier?

A. Yes, sir, right on the pier.

Q. How far from the float where they were going to take this material, were the bales?

A. Between 15 and 20 feet away (indicating.)

Q. Is that 15 or 20 feet to the plank that goes to the float?

A. Yes, sir, it is.

Q. Now, just what kind of freight was it?

A. Paper.

Q. Bales of paper?

A. Bales of paper.

Q. Did you notice how big those bales were?

A. Between five and six feet long.

Q. Between five and six feet long?

A. Yes, sir.

Q. Do you know about how wide they were?

A. They were about four or five feet, around that, wide.

Q. About how thick were they; do you know?

A. About that wide (indicating). They were about from here to the clerk's desk.

Mr. Sansone: You don't mean the clerk's desk, you mean where the judge is sitting.

The Witness: Yes.

[fol. 28] Mr. Sansone: I concede that that is about three feet six, is that right, Mr. Brumley?

Mr. Brumley: That is about three feet, yes. We will concede that.

Q. Do you know how much those bales weighed that you handled that day,

A. About 13,000 pounds—I mean 1,300 pounds.

Q. Had you handled that kind of paper before?

A. Before that date?

Q. Yes.

A. Yes, sir.

Q. Will you tell us how do you get the bales from the dock to the float? How do they get it on there?

A. How do they get them on?

Q. Yes, what do they have for that?

A. Two men put them on a hand truck.

Q. I am not getting to that yet. How do they get from the dock down to the float?

A. From the dock down to the float?

Q. Yes, do they have a plank?

A. There was a plank there but very low.

Q. How big was that plank, how wide?

A. About as long as that table (indicating).

Q. I mean going from the dock down to the float?

A. As I said, about as long as this, from where I am sitting over there.

Q. From where you are sitting, from where?

A. As long as that table, about.

Q. How long do you say the plank was?

A. About as long as that table (indicating counsel table.)

Q. From where you are sitting?

A. No, as long as that table, the plank is.

Q. You mean the plank was like the table, it was about the same width and about the same length?

A. Yes, just a little bit wider.

Q. How much wider, show us with your hands?

A. About like this (indicating).

[fol. 29] Q. Was it that much wide?

A. About like this (indicating).

Mr. Sansone: Do you concede that now to be about five and a half feet wide and about twelve feet long, as to the length of the plank?

Mr. Brumley: Yes.

Q. What was that plank made of, wood or what?

A. Wood.

Q. Heavy wooden plank was it?

A. Heavy wood, yes.

Q. Now on the sides of that,—was there anything on the sides of that plank?

A. Nothing on the side.

Q. Right on the top of the plank was there anything as it goes down?

A. Nothing.

Q. Were the rails up high or low?

A. It was all the way down.

Q. Were there any rails along the side of this plank?

A. No rails at all.

Q. At the time you got there will you tell us how much lower the part of the plank that was on the float was from the part of the plank that was on the dock?

A. About four or five feet.

Q. The tide was down, was it?

A. The tide was down, yes.

Q. And the flat was about four to five feet lower than the dock?

A. It was about five feet lower down to the dock.

Q. You mean above the dock?

A. Yes.

Q. Now when you got to Pier 42, what instructions did you get?

A. What instructions,—what do you mean?

Q. What did the foreman tell you?

A. The foreman told us to get one of the hand trucks and [fol. 30] to get the bales of paper out of there and take it to the float.

Q. And that truck is the usual hand truck with two wheels and handles?

A. Two wheels and two handles.

Q. Well, what were you instructed to do?

A. What?

Q. What were you instructed to do. Were you to have the truck that day?

A. No, I was to have no truck.

Q. At the time just before the accident when they got to Pier 42, were you told to take the truck?

A. Yes, sir.

Q. How many more of those men were told to take trucks?

A. Two men, two more men besides me.

Q. Now, did you put the bale of paper on the truck that day?

A. Yes, sir.

Q. Do you say you put the bale of paper on?

A. Well, the two men was putting the bales of paper——

Q. Did you put the bale of paper on the truck that day, and if so, how did you put it on?

A. Two men was putting the bales of paper into the truck.

Q. Well, now, had you taken any paper down on that float before the time that the bale that you were taking down when you got hurt?

A. Yes, some other day, but not that day.

Q. I am talking now about the day that you got there about a quarter after four.

A. No.

Q. You did not take any paper down before the accident?

A. No, sir.

Q. You are sure of that?

A. Yes.

Q. Did any one of the men working there at that time, when you went over at the pier at a quarter after four, did [fol. 31] any of them take any paper down?

A. No, sir; I was the first one.

Q. You are quite sure about that, are you?

A. Yes.

Q. When you got there, went over to start work, no one of your gang from down in Pier 37—38, that went over with you,—no one in your gang brought down any paper before you brought the first one down?

A. From my gang?

Q. Yes.

A. No, sir, I was the first one that tried to take it down.

Q. Of course, you had taken paper down there on other days before this?

A. When the tide was low like this?

Q. I asked you on other days had you taken this paper down?

A. Not all alone.

The Court: On days before this day when he was working there, did he take paper down.

The Witness: When the tide is high I used to take it but when the tide is low like it was that day, I never took it alone.

Q. What was that?

A. I say that when the tide was high I used to take it down, when it was low like it was that day that I got hurt, I never took it alone.

Q. What I am getting at is on days before the accident whether you took paper down alone there?

A. I used to take it down, me and two more men.

Q. Well, after these two men put this bale of paper on the truck, what did you do with the bale?

A. I took it alongside to the plank, and there I stopped.

Q. What did you do when you got alongside the plank?

A. What did I do.

[fol. 32] Q. Yes, what did you do when you got alongside the plank, what did you do with the bale?

A. I called to a fellow there in my gang to help me out.

Q. Did you hold the bale up in your hand or did you put it down?

A. What?

Q. Did you put it down or what?

A. I put it down.

Q. Well, after you called to some man to help you did some man come there?

A. Yes, some men came there and they moved the bale of paper—the men that came to help me. They moved the paper.

Q. I do not understand you, how many men came there?

A. Six and myself.

Q. Six other men came there?

A. There were six men altogether.

Q. That includes you?

A. Yes, sir.

Q. Six men altogether?

A. Yes.

Q. Now what did those men do when they came there?

A. They put the bale of paper up on the truck.

Q. Yes.

A. And they stuck the hooks into the bale of paper but they did not stick them in good. They left me alone to go down.

Q. Did you see them put the hooks into the paper, yes or no?

A. Yes, they put the hooks up.

Q. Now, after they hooked the paper, did you lift your truck, the handles?

A. When they put the hooks in, me and another man lifted up the truck.

Q. And when you lifted the truck was the bale in the back of you and you were going down straight?

A. I do not understand.

Q. All that I want to get at now is when you started down there were you in front of the bale, or was the bale in front of you?

A. I was ahead of the bale.
Q. You had two hands on the handles?
A. I was holding with two hands to the handles.

[fol. 33] Mr. Brumley: I think that we are going into rather leading questions.

Mr. Sansone: I am only trying to make it easy for everybody. It is hard for the man to understand.

Q. Were the men that had the hooks in the bale in front of you or in back of you?
A. In back of me.
Q. Well, after you lifted the handles, will you tell us just what happened?
A. They took hold and pushed down the truck so when the truck started to go down they lifted up the hooks and I do not know what happened, so I go down and the bale of paper goes onto me.
Q. Now after you lifted the handles and you started to go down, down the plank, did the truck come slow or fast from behind you?
A. It came very slow at first, but the plank was so deep down that the truck starts going fast and it goes down and it goes on to me.
Q. When the truck started to go fast what happened to you?
A. What happened to me?
Q. Yes, what happened to the handles or what happened to your hands that were holding the handles?
A. I was still holding on to the handles until the truck got down, and when the truck got down on the float it comes right on me, right on my leg.
Q. Did you hold up the handles until you got down to the float or did you hold all the way down the plank, or did you let go on the plank?
A. They left the truck go down. I went down with the truck; it go altogether down.
Q. Were you still walking down with it when you got to the float?
A. I could not get up when I got to the float, I fell down and I could not get up.

[fol. 34] The Court: Did you ever let go of the handles?
The Witness: I fell down with the car.

The Court: I asked you did you ever let go of the handles?

The Witness: No, sir, I could not open my hands.

Q. Do you remember when you started from the top of the plank to go down?

A. When I started to go down the truck come up like this (indicating) and so I could not open my hands and I had to go down with the truck.

Q. How far down the plank did you go when the handles were up straight like you showed us?

A. About three or four feet.

Q. Now, let us try and get it straight. You started and had the handles in your hands walking down, is that right?

A. Yes, sir.

Q. And you say that after you went two or three feet the handles straightened up?

A. Yes, sir.

Q. At the time that the handles straightened up was the truck going down slow or was it going down fast?

A. The truck was going fast and started to go straight and then it turned around and it went that way (indicating).

Q. What did you do when the handles went up straight?

A. I could do nothing.

Q. Did you still hold on the handles as it went down these other six or seven feet?

A. I just went with the truck.

Q. You went down together with the truck?

A. Yes, sir, altogether, up.

Q. Well, when you got down there did you see where these men were that were helping you when you started?

A. I saw some of them on the plank.

Q. Where? Near the top or the bottom of the plank?

A. Up on top of the plank.

[fol. 35] How close to the dock were they?

A. They were right alongside of the dock on the plank right alongside of the dock.

Q. That is, they were where you started from?

A. That was still in the same place yes, sir.

Q. What happened to you when the truck and the bale went down with the handles up as you have told us?

A. The truck and the bale and everything fell on my leg and I could not get up.

Q. Just where did it hit you, what part of your leg——

A. It hit me right here (indicating about the knee).

Q. What part of your leg did it go on?

A. Right here (indicating below the right knee).

Q. What was on your leg, the paper bale or the truck?

A. The truck was on top of the leg, and the bale was right where the car was going.

Q. The truck that you brought down was on top of your leg, is that right?

A. Yes.

Q. Well, now, about the rail?

A. The rail was under my leg.

Q. So that the truck was on top of your leg and the rails on which the cars go were underneath the leg, is that right?

A. Yes, sir.

Q. Where was the bale of paper?

A. The truck and the bale was on top of my leg, both legs.

Q. Do you know how much the truck weighed?

A. I don't know; I cannot figure it out.

Q. It is made of pretty heavy wood, isn't it?

A. Yes, sir.

Q. Good and strong?

A. Oh, I should say it was pretty near three hundred pounds, the truck.

Q. Now, on the other occasion when you worked there you say the men took those bales of paper down with a man walking in back with the hook; is that right?

Mr. Brumley: I object to the question as leading.

The Court: Objection sustained.

[fol. 36] Q. Now, will you tell us, Mr. Nogueira, on other times, before the accident, how they used to take the bales down when they had these heavy bales weighing 1300 pounds?

A. We used to take them down.

Q. I mean, but when the tide was low like it was that day?

A. Well, then they used to get four or five men, that is when we took a big bale like that one, and when the tide was low, we used to get four or five men to do it.

Q. Well, how would they hold it back?

A. They would go two ahead of the truck and four behind and put their hooks in the bale of paper and pull it back all the time to let it go down easy.

Q. Other times when they put in hooks good like you say, they held it back and let it go down easy, is that right?

Mr. Brumley: I object to that question.

The Court: Objection sustained.

Mr. Sansone: Exception.

Q. Well, how did the bales go down on the other days before the accident when, as you say, they put hooks in good?

A. Well, they hook the hooks good and then it goes down easy.

Q. And when they go easy, do the handles come up or do the handles stay the way you hold them, when they start?

A. They go about like this (indicating about the waist).

Q. After the accident where did they take you?

A. They took me to Pier 42 and from there to the hospital.

Q. They first took you to the Jewish Hospital?

A. To the Jewish Hospital, yes, sir.

Q. And you stayed there how many days?

A. Two days.

Q. And after that they took you from there, did they?

A. Yes, sir.

[fol. 37] Q. Now where did they take you?

A. Where?

Q. Yes, did they take you to any other hospital?

A. Yes.

Q. Where?

A. They took me to the Columbus Hospital.

Q. What did they do to you at the Columbus Hospital?

A. They put me in bed.

Q. I know, but what did they do to your leg?

A. They put a cast on it.

Q. A plaster cast?

A. Yes.

Q. What kind of a plaster cast? A hard cast?

A. A plaster cast, yes, sir.

Q. How long was the cast of plaster on, how many weeks did it stay on?

A. I do not know exactly, but about eight weeks.

Q. Eight weeks?

A. Yes, sir.

Q. Now, how did the leg feel before you went to the hospital and while you were in the hospital?

A. It hurt.

Q. I know that, but how did it feel before you went to the hospital and while you were in the hospital as to whether or not you had any pain in it right in the leg?

A. Before they took me to the hospital the only thing I could see was blood on my leg.

Q. You saw what?

A. Before I went to the hospital I got hurt on the leg, but I could not see good.

Q. How did it feel?

A. It hurt very, very much. It was hurt very much.

Q. How did you feel in the hospital, did it hurt you there?

A. Well, for 25 days it hurt very bad every day.

Q. For 25 days it hurt all the time?

A. Yes, sir, it did.

Q. Well, after you left the hospital you had a cast on, did you?

A. Yes, sir.

[fol. 38] Q. How long after you got out of the hospital was the cast taken off?

A. About three weeks.

Q. After they took the cast off, how did the leg feel; did it feel all right, or what?

A. The leg was stiff, it was sort of dead.

Q. Dead?

A. Yes, sir.

Q. How long after they took the cast off did you walk on it?

A. After three months I started to walk on it.

Q. And when you started, did you start right off or did you have to use a cane or a crutch or how did you get along?

A. When I started I had to have what do you call those things?

Q. Did you have to have crutches?

A. Yes, sir, crutches.

Q. How long did you have crutches?

A. About a month.

Q. That was right after they took the cast off, you used crutches for a month; is that right?

A. After they took the cast off I could not walk at all for three months, and then I walked with crutches for three months and then I had a cane.

Q. Well, how is your leg now? How does it feel?

A. When I walk it gets tired and when it is cold it hurts me.

Q. You mean when the weather is cold the leg hurts you?

A. Yes, sir, it does.

Q. Well, where does it hurt you?

A. Sometimes below the knee and sometimes right on the knee.

Q. But you get around now without any crutch or cane or anything; is that right?

A. I am walking without a crutch and without a cane.

Q. And you have done some work since the accident, haven't you?

A. I went down to the dock at Hoboken to work on those Munson Line ships.

Q. Did you work for the Munson Line on a boat?

A. I was feeling bad so I was putting brick in a bag, I [fol. 39] was sitting down putting the brick in bags.

Q. And this work that you did there, did you do it sitting down or did you have to run around?

A. I was sitting down, like I am now.

Q. Did you do any other work besides putting brick in bags?

A. That is all that I did.

Q. And you started to work there about the latter part of March, 1928?

A. About the latter part of March, 1928.

Q. How long did you continue to work for the Munson Line?

A. Today I still got a job or I go to work there when I am able to work. Sometimes I get tired, and I cannot work at all.

Q. Well, when you started to work there in the latter part of March, did you work steady or did you work on and off?

A. Well, two or three or at the most four days a week.

Q. Why didn't you work steady?

A. Because I could not work. The leg gets very tired and it hurts me.

Q. What did they pay you over there on the Munson Lins?

A. 50 cents an hour.

Q. Now, answer me this question. At the time that you were working for the New York, New Haven & Hartford Railroad Company, what was your pay there, how much did you earn a week?

A. It depended on how many hours we worked. Maybe $24, $26, or $28 a week.

Q. A week?

A. Yes, sir.

Q. How long did you keep working after you started with the Munson Line in March, 1928?

A. About a month.

Q. How long were you away from there?

A. Well, last month I do not work.

Q. Well, why did you stop working?

A. Well now, when the warm weather come, the leg swells up and I cannot work because the leg swells up.

[fol. 40] Q. The leg swells up and you cannot work?

A. That's right.

Q. Well, how long since you have been working there?

A. Since the third of last month I do not work.

Q. That is June?

A. From June until now.

Q. How long have you been away from there—not working there?

A. As I say, from June until now.

Q. Well, how have you been feeling since last June. How has the leg been feeling?

A. Pretty good if I do not walk much, but as soon as I walk on it or have to do something with it the leg gets tired.

Mr. Sansone: That is all.

Cross-examination by Mr. Brumley:

Q. Mr. Nogueria, when you started down the gangplank there was a man alongside of you, wasn't there, on the day of the accident, I mean?

A. The gang was with me.

Q. But when you started down the gangplank with the truck, there was a man alongside of you holding on to the handle on the right side, wasn't there?

A. There was four men on the back and another one at the handle with me?

Q. And were you between the two handles?

A. Yes, sir.

Q. And this other man that had his hand holding one of the handles?

A. Yes, he was there.

Q. Well, was he there to your right?

A. He was in back of me.

Q. You mean the other man that had ahold of the handle was also between the two handles?

A. I was the only one between the two handles, the other man was in back of me.

Q. But he had a hold of one of the handles, didn't he?

A. That was the hook and I was with the handle.

[fol. 41] Q. Just listen to this question, will you, please. When you started down the gangplank wasn't there another man alongside of you holding on to one of the handles of the hand truck?

A. There was four on the back and I was in the middle between the handles and one was on the right of me.

Q. That man that was at the right of you had a hold of one of the handles, is that right?

A. He was holding one of those handles.

Q. Now, that man that was to the right of you went all the way down the gangplank, didn't he?

A. I was the only man that went down with the truck.

Q. You mean you were the only man that went down with the truck?

A. Yes, sir, I was the only man.

Q. You are sure about that, are you?

A. I am positive.

Q. Well, what became of the man that had ahold of the handle?

A. I don't know; those fellows were there working with me. There was negroes and two or three men.

Q. Now as I understand, there were four men on the rear of the truck near the pier, on top of the plank, who had hooks and who stuck those hooks in the bales, is that right?

A. Yes, but they did not stick them in good.

Q. But they stuck those hooks in the bales, is that right?

A. Yes, sir.

Q. Now you saw them do that, did you?

A. I saw that.

Q. And then after that you started down the plank, is that right?

A. I went down.

Q. Yes or no?

A. Yes, sir.

Q. After that you started down the plank, is that right?

A. Yes, sir.

[fol. 42] Q. And your back was to the four men in the rear, is that right?

A. Yes.

Q. And you had ahold of the handles all the way down the plank, yes or no?

A. I have to go down. I could not hold it.

Q. Didn't you say in answer to your last question that you had ahold of the handles of the truck all the time you were going down the plank until you got to the float?

A. Yes, sir, the handles were up like that and I went down until I get down I could not leave the handles alone. The handles were like that (indicating).

Mr. Sansone: May we have the record indicate that the interpreter holds his hand up.

The Court: Let the record so indicate.

Recess until 2:00 P. M.

Afternoon Session

Victorio Nogueira resumed the stand:

Cross-examination by Mr. Brumley (cont'd):

Q. Mr. Nogueira, are you sure there was no guide rail on the sides of this plank?

A. Yes, sir, I am.

Q. Do you know, or don't you remember that on this plank, as on the other plank there was a rail about three inches high on each side?

A. All the time, they have rails on the other planks, but not on that day.

Q. Are you sure about that?

A. Yes, sir.

Q. You didn't measure this plank of course at any time?

A. No, sir.

Q. I think you estimated that the plank was about as long as this table (indicating counsel table); is that right? [fol. 43] A. About that long, a little more wider.

Q. Would you be willing to say that the plank was not as long as—well, say 18 feet?

A. I don't know for sure how many feet it is. I think it is about that long.

Q. Did this plank run from the dock to the float or did it run from the dock to the floor of a car?

A. It went from the dock to the float.

Q. Well, did the plank go into the car?

A. It goes from the dock, right alongside the float.

Q. Well, did the plank go into the car, yes or no?

A. It goes to the middle of the float, not into the car.

Q. Now, when you fell down you were on the floor of the float, is that right?

A. Right on the float.

Q. And what hit you?

A. The hand truck and the bale of paper goes over on my leg.

Q. You say that both the paper and the hand truck hit you?

A. Yes, sir.

Q. Was the bale on the hand truck when it hit you?

A. It was half and half. Half into the truck and half on to the floor of the float.

Q. And you were knocked down?

A. Yes, sir.

Q. Did you become unconscious?

A. I was falling on top of the rail, and the hand truck and the bale of paper they came over on my leg.

Q. I will ask you again. Did you lose your consciousness, did you pass out, did you forget where you were?

A. I just lay.

Q. Just a little do you mean?

A. I just lay a little out of my senses.

Q. Do you know who picked you up or helped you?
A. It was a colored fellow and another Spanish fellow.
Q. Now, in March you did some work, did you?
A. Yes, sir.
[fol. 44] Q. And did you work over in Hoboken at that time?
A. Yes, sir.
Q. That was for the Munson Line, is that right?
A. Yes, sir.
Q. And that was sweeping vessels, was it?
A. Yes, sir.
Q. And since March 1928 up until June the 3rd of this year, you have worked off and on, is that right?
A. Yes, sir.
Q. And was it all the time for the Munson Line?
A. Yes, sir.

Mr. Brumley: That is all.

Redirect examination by Mr. Sansone:

Q. When you fell down, Mr. Nogueira, and the truck and the paper went on you while you were lying there could you see the truck and the paper on you?
A. Yes, sir.
Q. You knew where you were and what was going on?

Colloquy Between Court and Counsel

Mr. Brumley: I object to the question.
The Court: Objection overruled.
Mr. Brumley: Exception.
The Witness: Yes, sir.
Mr. Sansone: That is all.
The Court: I will hear your motion now, Mr. Brumley.
Mr. Brumley: This argument will be an open motion; is that right, your Honor.
The Court: I will hear your argument upon motion.
Mr. Brumley: If your Honor please, I call your attention to the testimony that this accident happened on the floor of the float itself, and I think it cannot be denied that therefore the accident happened upon navigable waters in the [fol. 45] East River, at Pier 42, and I don't think it makes

any difference whether it happened on the gangplank or on the plank from the dock to the float or on the float itself. In either case it would be on navigable waters.

Regarding court decisions on this subject, I would like to call your Honor's attention to the opinion No. 29, on January 20th, 1928, approved by the United States Employees' Compensation Commission, Washington, D. C., particularly to that paragraph on page 43, which states in substance what I am contending here (hands court printed opinion).

The Court: Just what is your point?

Mr. Brumley: My point is, your Honor, that effective July 1, 1927, there was an act to provide compensation, a federal act, for disability or death resulting from injury to employees in certain maritime employment, and that under that section, under Subdivision A of that section, of that act, it is provided that compensation shall be payable under this act in respect to disability or death of an employee, but only if the disability or death results from injury occurring on navigable waters of the United States, including drydock, and for recovery for disability or death, to the workmen's compensation proceedings, for an amount provided by the law, and then it provides for other things such as cases when the compensation shall not be payable covering crews of vessels.

And section 4 provides for liability for compensation. Section 5 says this: "Liability of an employer described [fol. 46] in section 4, shall be exclusive of any place, and all other liability of such employer to employee," as legal representative, husband, wife, next of kin or anyone else entitled to recover damages from such employer, at law or in admiralty, on account of such injury or death.

Now that, if your Honor pleases, expressly makes the compensation act, effective July 1st, 1927, exclusive. We have here the Federal Employers' Liability Act of 1908, amended 1910. We have Congress passing on it since last year, this Employers' Liability Act of 1908 and then Congress passed this last year this Longshoremen's Compensation Act, and it expressly says it is exclusive of all remedies in law or in admiralty, but that it is only applicable, it is applicable to places arising on navigable waters such as cases involving crews of ships, so that here, as I under-

stand it, is a clear case for the application of this act to the exclusion of the Federal Employers' Liability Act. The fact that this man is an employee of a railroad company, of course, does not give him any remedy under the federal act by this later enactment, and we find that his remedy is solely by way of compensation.

The Court: Is that as to 1908?

Mr. Brumley: The federal act passed in 1908 and this act became effective in 1927, July 1st.

The Court: In July, 1927?

Mr. Brumley: Yes.

The Court: When did this accident occur?

[fol. 47] Mr. Brumley: In October, 1927, after seven months. Now it would be rather far-fetched, your Honor, to say that Congress did not have in mind the Federal Employers' Liability Act. It would be rather far-fetched to say that they did not mean what they say, when they say that it is exclusive of all other remedy at law or in admiralty.

Now the Compensation Commission in that opinion as passed upon, when they passed upon the question, they said that the right of an interstate commerce employee having a compensation under the Federal Liability Act, is enforcible at law.

Now I have not been able to find any decision on the point in a court decision, your Honor. Of course, this thing is all new, there has been no time for any authoritative ruling on the point.

We do know the attitude of the compensation commission in Washington and that their interpretation and entertaining jurisdiction in cases of this kind. We feel that their view is correct so far as this case is concerned, and that the remedy is by way of compensation and not under the Federal Employers' Liability Act.

Now, your Honor, there are of course a great many employees who do not come under the Federal Liability Act. There are a great many employees who do. It would seem to be that Congress has sought to provide compulsory compensation for employees of railroad companies and steamship companies. Employees who are engaged in so-called longshoring work, who are engaged in trucking to and from

[fol. 48] vessels, and who are engaged in working on vessels. They have partly occupied the station field taken by the Federal Liability Act. They have said, in so many words, that the Federal Liability Act is limited to the extent covered by this old law, and this compensation law, instead of saying that, they said at or any navigable waters of the United States.

By that I believe, your Honor, if this accident had happened on the dock, it would be another question. It did happen, I think without question on navigable waters on this float, which was in the water and in that event it eliminates the action in tort, whether it be an action in tort or an admiralty matter, it does not matter.

There is no question that Congress has a right to legislate. It has legislated and it goes to the very fundamentals of the subject. It has given the athority to the United States Employees' Compensation Commission at Washington, and an act of Congress cannot very well be twisted around. It is quite plain.

The Court: I will hear you, Mr. Sansone.

Mr. Sansone: Of course, your Honor, it is conceded by both sides that in this act there is no mention of the Federal Liability Act at all. Your Honor is well familiar with that act which was passed in 1908 and without exception the United States Supreme Court has held that in cases involving employees engaged in interstate commerce, that that act is exclusive and that it is the only remedy.

If we will just look into the history leading up to the passage of this act, why I think that it will clearly appear [fol. 49] that they could not have had in mind the employers' liability act or anything in that form.

If your Honor recalls, in 1917 Congress passed an amendment to the Judicial Code that a man engaged in maritime work, a common law action conferred jurisdiction on the federal court, and later, in 1922, an act was passed to overcome the obstacles and in which was expressly stated and which held that no compensation is applicable, and finally, in 1922, they passed a *a* statute which said that they could apply the compensation act to the various states, and when they went up in the case of Washington vs. Dawson, 276 U. S., where they attempted to argue for the payment of compensation according to the compensation

act of various states, why the Supreme Court says now you must have uniformity in maritime matters, if it can be done, and if Congress wants to pass a federal compensation act, they can do it, but they cannot make state compensation acts applicable to seamen.

Then we had the Jones Act of 1920, just to show what was in Congress's mind, the trend of the legislation was then.

In the Jones Act of 1920, which youh Honor is familiar with, in any action where a seaman is hurt, he shall have the benefit of the Federal Liability Act, and the fellow-servant rule applies. That was for the protection of a man working on the sea, and of course it did not cover longshoremen, in fact, the cases would hold that if a man was a seaman and a member of a crew, he came under the Jones Act with the protection of the comparative negli- [fol. 50] gence doctrine and the fellow servant rule, and he could recover.

That was the state of affairs until the Hunt case of 1925, in the October Term of the United States Supreme Court, held that a longshoreman engaged in doing work that a seaman used to do, that for the *the* purposes of the Jones Act, he was a seaman and it was fair for him to come under the same category, and after the Hafferty case, when the United States Supreme Court held that a longshoreman was a seaman, then this statute was passed to cover longshoremen and harbor worker employees.

Now we have this situation, if the contention of the defendant is to prevail here. In all cases under the Federal Liability Act, one disciplinary feature was that employees in railroad companies must have a uniform remedy and so it was that none of the States would legislate.

The United States Supreme Court has consistently held that where he is engaged in interstate comerce, that the States cannot interfere. Now if the defendant's contention is to prevail here, this situation develops, your Honor.

If a man is working on a dock, and this same man was working on a dock, loading this material on a hand truck. He loads this material and this material goes out of the State. He is engaged in handling interstate commerce. If he is hurt on the dock, his compensation comes under the Federal Liability Act, but if he is hurt on the float then

if the defendant's contention is to prevail here, if he takes it to the float, he must get compensation.

[fol. 51] When he is on the dock, his rights are defined by the Federal Liability Act. When he gets on the boat, he must take compensation.

We have a very remarkable situation developed, your Honor. Assuming that a string of cars, ten cars, say, let us assume that there is a string of ten cars being pushed on to this float. The man at the head end of the string of cars is being pushed ahead, and he is on the float, and he has compensation, and the man at the other end is still on the land and that is under the Employees' Liability Act, because the statute says he must be on navigable waters. Let us assume that a man is working on a car on a float. There is a defective coupling, a defective hand-hold gives way, anything that is covered under the Safety Appliance Act, and which says that if the railroad company does not give them a coupler that couples automatically or a hand-hold that is safe, those things which come under the Saf-ty Appliance Act.

Now I submit, your Honor, that Congress never intended to repeal that act which stood under fire in the United States Supreme Court for twenty years. Now let us assume, if their contention is to prevail. These acts were primarily passed for protection of men on the water. A member of the crew is protected in Congress by the Jones Act, and they were put into the same class as railroad employees, where contributory negligence did not bar, and where the fellow-servant rule was abolished they were put [fol. 52] into that class, and now under this act, that is the Jones Act, passed in 1920, they came under the Federal Liability Act, but because it says here if they are on navigable waters, it must be that the Federal Act is abolished. Now, your Honor, about the only thing in this statute which might give any color to the argument is that point in section 5, which says to recover damages from such employer, at law, or in admiralty, and it seems that they argue that at law you must read into that law under the Employees' Liability Act, or common law. Your Honor is familiar with cases where they proceeded in a common law cause of action and in maritime cases, maritime law, attort in federal courts, and when they refer to "at law" it is plain that

they intend to say to cover these kind of cases where longshoremen are to recover "at law or in admiralty."

If your Honor will turn to Section 37 of the Act it shows just what Congress had in mind I think.

You will see, your Honor, that they cannot work on a boat unless they have certified as to that. I submit, your Honor, that where Congress has passed a federal law, which has not in any way been questioned by the courts, I submit—as they say in the Knickerbocker Ice case vs. Stewart—and I submit that case to you now, your Honor, to read (handing Court printed opinion).

Now, your Honor having finished reading that, I simply say in closing, that I do not believe that they ever intended to so modify the federal act as to throw the employees of [fol. 53] railroad companies into a state of chaos. I submit that they never intended to do that, and there can be no such consideration put on it.

The Court: Is there anything in this record to show what kind of a boat it was. If you will notice, gentlemen, section 2, paragraph 3, provides "Any boat under 18 ton."

Mr. Sansone: There is nothing in the record now, your Honor.

The Court: That it does not disclose——

Mr. Brumley: The record just says a float upon the water, your Honor.

The Court: Is this float moved about from place to place by a tug?

Mr. Brumley: Yes.

The Court: Is it a large railroad float?

Mr. Brumley: It is a float on which are tracks, on which are cars and moved about the harbor from one place to another pulled by a tug.

The Court: And is pulled up alongside this pier with the cars on it to be loaded?

Mr. Brumley: Yes.

The Court: And then it was loaded by this gangplank from the dock up here on to the boat?

Mr. Sansone: Your Honor, they just pull these barges right up so that the trucks come down, and the track meet the cars, the tracks on the float and the tracks on the dock meet, and the cars go right on and off.

Mr. Brumley: I think, your Honor, that section 3 does not apply in this case in a way, because it more or less limits the crew of any vessel.

[fol. 54] The Court: It says it does not include any person engaged by any master to load or unload.

Mr. Brumley: It does not include the employee of a master of a vessel.

The Court: This, however, was the New York, New Haven & Hartford Railroad Company. It does not make much difference I do not believe whether they meant the master of a boat or the master of the New York, New Haven & Hartford Railroad Company. In this case you must take it as the master of the New York, New Haven & Hartford Railroad Company.

The record, however, does not show anything about ton nage and we cannot do anything on the motion at this time. The motion is temporarily denied, or rather, I will reserve decision on the motion.

Mr. Sansone: May I call another witness?

The Court: You may.

Dr. Roy Lee Blackman, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. Sansone:

Q. Dr. Blackman, you are a duly authorized licensed practicing physician in the State of New York?

A. I am.

Q. How long?

A. Since 1914.

Q. And with what institutions are you connected?

A. The Ruptured and Crippled Hospital.

Q. In what capacity?

A. Assistant surgeon.

Q. Did you doctor a patient who appears as the plaintiff in this action, Victorio Nogueira?

A. I did.

[fol. 55] Q. Do you recall when?

A. In February, this year.

Q. Do you remember when in February?

A. I think on February 20th.

Q. Where?

A. At my office.

Q. Will you state what the nature of the examination was that you made, and what you found to be the matter with him?

A. His right leg was greatly swollen above the knee, and down the leg, including the ankle joint, with a bowing or turning outward just below the knee. The ankle was restricted about fifty per cent of normal in motion. That is, he indicated the extent of flexibility of the ankle was something around fifty per cent, and the knee was restricted about seventy-five per cent of normal. That is indicated in bending it back. There was a thickening about the knee joint with a callus formation, which is new bone, over the upper end of the large bone of the leg, at the knee joint, at the junction of the middle and upper thorid. Also a callus formation was felt over the tibia, which is the small bone on the outer side of the leg about two inches below the knee joint. The right leg which was the injured leg, measured one and one-half inches shorter than the left leg, and I took X-ray pictures that showed the multiple fracture.

Mr. Brumley: I object to that.

Q. Just a minute, doctor. Did you take X-rays yourself?

A. Yes, sir.

Q. And in your work since 1914, have you had occasion to take X-rays?

A. Yes, I have, thousands of them.

Q. I show you an X-ray, doctor, and I ask you if that is the X-ray that was taken by you of the plaintiff's leg?

A. Yes, it is.

[fol. 56] Mr. Sansone: I offer it in evidence.

Mr. Brumley: No objection.

X-ray marked Plaintiff's Exhibit No. 1.

Q. How many views did you take, doctor, of the plaintiff's leg?

A. Two.

Q. Taking the first, doctor, the first view (exhibiting X-ray photograph), the view on the left of the X-ray as shown there, will you tell us just what view that is?

A. That is the rear posterior view. That is taken directly through the front of the leg. There is a lateral view taken, with the leg sidewise, with the rays going through the side of the leg.

Q. Will you explain to us, doctor, the X-ray of the anterior posterior. Will you please tell us what that shows?

A. That shows a fracture through the upper end of the tibia which is the large bone, with the point of the fracture starting about two inches below the articulation of the knee. And this extends upwards into the knee joint itself.

Q. How far into the knee joint does that go?

A. It goes right into the articulating surface of the tibia, which is the knee joint. It also shows a fracture of the fibula, which is the small bone at this point, and an oblique fracture at the junction of the upper and middle part of the tibia, with a marked displacement of angulation of fragment. There is a callus formation shown around all three of these fractures.

Q. Now, can you describe to us the joint there where they have grown together, whether they have grown in that position, or is there some over-riding there?

A. The fracture extending into the joint is held in that position, but the fracture at the junction of the upper and the middle there is held with a marked over riding and angulation.

[fol. 57] Q. Doctor, how much do they overlap?

A. How much?

Q. Yes, doctor, how much do they overlap; can you tell us?

A. About an inch and a half, and also the fragment is displaced upwards, this being the upper end of the lower fragment (indicating), and this being the lower and of the upper fragment (indicating).

Q. So instead of the bones growing right together, where they were originally, they have grown together side by side; is that right?

A. Yes, sir.

Q. Then the bone is not the same as it was originally?

A. Well, the bone originally was much smaller than at the present time, or at the time the X-ray picture was taken, but that is due to the large amount of callus formation thrown out around this fracture.

Q. Confining yourself to the X-ray taken laterally, will you point out to us what that represents?

A. This shows the same fracture at this point, extending up to the knee joint, also shows the fracture of the fibula with the angulation. It also shows the fracture of the tibia with the posterior and lateral angulation. This bone (indicating) should come down in a straight line, but it comes down that way (indicating), and then over this way (indicating).

Q. Doctor, what effect has an injury, such as he sustained, and as shown by the X-ray—what effect does that have upon the plaintiff's ability to work?

A. Such a condition would cause pain and also throw all the weight of the body out of line and puts a stain on the knee jont. This large amount of callus and angulation and deformation interferes with the circulation, and causes the leg to swell.

Q. What effect regarding a limp?

A. It would cause him to limp and cause him pain.

[fol. 58] Q. It would be sufficient cause for limping and shortening?

A. Yes, it would.

Q. Now you treated him for some time, did you, doctor?

A. He came to me, came to my office twice a week, for seven visits.

Q. What was the nature of the treatment?

A. Baking and massaging and ligature treatments.

Q. What was that for?

A. Try and limber up the joint and increase the circulation and relieve the pain.

Q. Did the knee limber up?

A. Somewhat, yes.

Q. So while it was about 75 per cent loss of motion, when you first saw him there was some change?

A. It was 50 per cent when I last saw him.

Q. Indicating that the treatment had been beneficial?

A. Yes, sir, it improved the motion and the pain.

Q. Can you tell us doctor, whether or not this limp that he has now, whether that will be permanent?

A. He will have to limp due to the shortening, that is permanent.

Q. Can you give us any idea how long this knee will become inflamed when he walks?

A. Every time he puts extra strain on the knee it will swell. I can't say how long; for several years anyhow.

Q. You say that the condition that you found, that would be a competent and producing cause for discomfort there?

A. Yes, sir, pain and swelling.

Q. Would a man, being thrown down, and struck by a hand truck, weighing some 300 or 400 pounds, and falling on it, and having the bottom of the leg raised on a rail, would such an accident be a competent producing cause for the condition that you found?

A. Yes, sir, it would.

Mr. Sansome: That is all.

[fol. 59] Cross-examination by Mr. Brumley:

Q. Doctor, of course the pain that you describe is purely subjective, there is nothing that you can see or tell of your own knowledge?

A. Well, the swelling and loss of motion would cause pain.

Q. Pain itself is something that he has to tell you about, isn't it?

A. He has to tell me about it, but I know he has pain due to the swelling.

Q. There is nothing that you can see or feel or hear?

A. No.

Q. When did you make your first examination, doctor?

A. February 20th, of this year.

Q. When was the last time that you saw him?

A. Well he came to my office twice a week for seven visits, that is about four weeks later.

Q. That is, from February the 20th to some time in March you treated him, is that right?

A. Yes, sir.

Q. You have not seen him since March to examine him, have you?

A. No, I have not.

Q. And had you finished your treatment of massaging and baking?

A. I told him to continue it, but he stopped coming.

Q. And while he was under your care, I believe you said you noticed a considerable improvement?

A. In motion only.

Q. You also said you thought there was less pain?

A. Yes, I would say he had less pain.

Q. Now, when you examined him on February 20th, of this year did you see how much restriction there was, and doctor, did you say how much you found?

A. I found 75 per cent loss of motion in the knee joint.

Q. In flexion?

A. Yes, sir.

Q. Will you just show us about how far he could flex his [fol. 60] right leg. Use your own leg for an illustration, doctor?

A. About like I have it now (illustrating). Half way between full extenion and the right angle. Right about in that position (indicating).

Q. After you had given him seven treatments, how far could he—I mean, to a right angle?

A. Like this (indicating).

Q. So that after seven treatments he could flex it down to a right angle?

A. Yes.

Q. You don't suppose you know what flexion he has at the present time?

A. I do not know.

Q. How did you measure for shortening of the leg?

A. With a steel tape from the spine on one side, to the ankle, and from the other side to the ankle.

Q. Was he standing up or lying down?

A. Lying down.

Q. Did you make more than one check?

A. I measured each way twice, marking each point with a pen.

Q. And you estimated that it was an inch and a half?

A. It was not my estimation, it was my finding.

Q. You found that it was an inch and a half?

A. Yes, sir.

Q. It is true, doctor, isn't it, that of course an individual can have a difference in the length of their legs?

A. They are not normal if they have.

Q. Isn't there a degree of normality?

A. There are some people that have a slight shortening of one leg, and that is usually traced to some disease.

Q. And when this occurs to the extent of half an inch sometimes it is almost unnoticeable, isn't it?

A. Yes, sir.

Q. And the individual himself compensates for that, doesn't he?

A. Yes, sir.

[fol. 61] Q. And in addition to the individual compensation, you can make mechanical compensation for shortening by raising the heel of the shoe?

A. Yes, sir.

Q. And with the raising of the heel of a shoe there would be no necessity of a man having to limp?

A. Are you talking about this case?

Q. Any case?

A. I cannot answer about any case. I believe this man would have to limp even with the heel raised.

Q. If the heel was raised to the proper amount to correspond with the length of the other leg, it would tend a great deal to compensate for shortening?

A. Not so much for the limp.

Q. It would tend to compensate for the shortening, wouldn't it?

A. Yes, sir.

Q. Now, when you examined him in February, did you find that the knee was swollen at all?

A. Yes, I testified to that. There was a marked swelling and also in the ankle.

Q. Do you know how much swelling there was of the knee, over and above the left knee?

A. Never so you could see it.

Q. That swelling was what you might call in outline. It was a general swelling of the knee?

A. It was a general swelling of the knee, the leg, and the ankle.

Q. Did you notice after seven treatments,—was there a swelling, or had it decreased somewhat?

A. The swelling had decreased.

Q. It had decreased somewhat?

A. Yes, sir.

Q. Well, did you take any measurements at that time, doctor?

A. I did not.

Q. You did not?

A. No.

Q. You have not noticed any swelling at the present time, or whether there is any?

A. No, I have not noticed.

[fol. 62] Q. Now, I think you said on direct examination, doctor, that the fibula fracture up, or near the knee, had united the fragments.

A. No, I was talking about the tibia. The tibia has a opposition fracture at the upper end, or here (indicating). It is not the fibula.

Q. And both in the fibula and tibia, below the knee, there is some callus formation?

A. Yes, sir. There is callus formation on all points of the fracture.

Q. And that callus formation indicates a union?

A. Yes, sir, very muc'

Q. What would you say as to the condition—I withdraw the question. What would you say as to the circulation of the leg at the time you had given him seven treatments, after completing the treament?

A. Well, the swelling subsided.

Q. Well, was the circulation improved?

A. Well, if the swelling subsided, that proves that circulation had been improved.

Q. So there was an improved condition in the circulation?

A. Yes, sir.

Q. You are sure of that?

A. Yes.

Q. Did you know that he was doing any work when he was under your care?

A. I don't think so. He came to my office in the middle of the day between one and three. He was not working at that time, at least, he was not in working clothes.

Q. But you really don't know whether he was working or not, do you?

A. No.

Q. Well, when he first came to you in February, was he using his cane?

A. Yes, he was. I believe he was using a crutch in the first visit.

Q. So during the course of the treatment by you, he changed from a crutch to a cane?

A. Yes.

Q. At the end of the seventh treatment, had he discarded the cane?

A. No, he still had the cane.

[fol. 63] Q. Now, did you notice the condition of the muscles of his leg, doctor, when he first came to you?

A. There was no particular way to tell about the muscles. There was so much swelling that you could not tell the condition.

Q. You could not tell anything of the condition of the muscles at all?

A. Well, there was no athophy.

Q. You say there was no atrophy?

A. No.

Q. Well, you knew of course the leg had been in a plaster cast for some time?

A. Yes.

Q. And you know, don't you, doctor, that after—I will withdraw that question. Now, doctor, was there any atrophy?

A. There was no atrophy of the muscles.

Q. Well now, you know, doctor, that after a leg has been in a plaster cast there is an atrophy, don't you?

A. Immediately after, not seven weeks later.

Q. Well now, doesn't that atrophy condition continue after the cast has been taken off for some time?

A. Sometimes yes and sometimes no. It is a question if it would or not.

Q. Do you know how long the cast was on?

A. He told me seven weeks.

Q. That would cause considerable atrophy of the muscles, wouldn't it, doctor?

A. Yes. But he did not have it at the time that he came to me because it was some time after the cast had been removed.

Q. But the muscles go back to normal later on, don't they, doctor?

A. Yes.

Q. And in order for them to get back to normal they would have to be used, these muscles would have to be used?

A. Yes, sir.

Q. And atrophy would continue for some time after the usage began?

A. Yes, sir.

[fol. 64] Q. And when you saw him you did not notice any atrophy of the muscles of the leg, that is February 20th?

A. There was too much swelling and I could not say as to whether or not there was atrophy.

Q. You did say there was not?

A. Yes.

Q. So when you say that you mean the muscles above the knee as well as below, don't you, doctor?

A. Yes, the thigh and leg muscles.

Q. You saw no atrophy either above or below the knee?

A. No, I did not.

Q. Have you noticed Mr. Nogueira's shoes?

A. No.

Q. Have you noticed whether they are symmetrical in the soles or not?

A. No.

Q. Now I suppose, doctor, that when you were referring to the knee motion, you were referring to the active motion of the knee, weren't you?

A. The motion made by the man himself.

Q. The motion made by the man himself that is the normal active motion of the knee?

A. Yes, sir.

Q. And did you try possibly to move the leg?

A. Yes, sir.

Q. And when you tried to flex the leg, how far back would it flex?

A. No more than the same distance.

Q. That was when you first saw him?

A. Yes, sir.

Q. So what would you say as to the condition of the ligaments of the leg when you first saw him?

A. That is very hard to tell in my opinion, but I believe that two ligaments were torn with that type of frac-

ture. I felt the leg, and they were the two most likely ligaments.

Q. Did you notice any flexibility in the lateral ligaments?

A. He had no lateral mobility in the knee joint.

[fol. 65] Q. Did you notice any weakness of the ligaments?

A. Any weakness?

Q. Yes.

A. You cannot determine that.

Q. Did you notice any atrophy in the knee?

A. No.

Q. And of course you don't know what care or attention he has received since he left you?

A. No.

Q. Did you find any water on the knee when you saw him, doctor?

A. No, sir.

Q. No signs of that at all?

A. No.

Mr. Brumley: That is all.

By Mr. Sansone:

Q. Doctor, how did you account for the swelling in the knee at the time?

A. Due to adhesions and circulation, loss of circulation about the knee joint, due to the fracture.

Mr. Sansone: That is all.

The Court: Any more questions, Mr. Brumley?

Mr. Brumley: No.

Mr. Sansone: The plaintiff rests.

Plaintiff rests.

Mr. Brumley: It is conceded, that if Captain Clark, the assistant master of the lighter of the defendant, testified as to the weight of the float, the float involved in this case, he would testify that it weighed 500 tons. The plaintiff, it is conceded, would call no testimony to dispute that.

Mr. Sansone: It is so conceded.

MOTION TO DISMISS

Mr. Brumley: If your Honor please, I now move to dismiss upon grounds before stated, and upon the further

[fol. 66] ground that the plaintiff failed to prove negligence on the part of the defendant and on the further ground that from the plaintiff's own story that he assumed risks of——

The Court: There is no question but what that is navigable water on the East River.

Mr. Sansone: The float was on navigable water.

The Court: Is there any question about it having been on these navigable waters and as to what occurs upon it?

Mr. Sansone: There is not. However, in 259 United States, there is a question where the accident happened upon a dock they held that it was not on navigable waters. The testimony here, your Honor, was that the men put their hooks into this bale while they were still on the dock.

The Court: I know what the facts are as well as you do. Mr. Sansone.

Mr. Sansone: I just wanted to call them to your attention, your Honor.

The Court: This injury arose upon a boat on navigable waters, a boat of more than 18 tonnage. The Compensation Act passed by Congress provides compensation for disability or death, and in view of the nature of this Compensation Act, I am thoroughly convinced that this Court has no jurisdiction, and that this man's remedy is one of application under that compensation act. Therefore the motion to dismiss is granted.

Mr. Sansone: I ask an exception, your Honor.

The Court: You may have an exception.

[fol. 67] In United States District Court

Stipulation re Transcript of Record

It is hereby stipulated and agreed by and between the attorneys for the respective parties herein, that the foregoing is the true transcript of the record of the United States District Court in the above-entitled case; that it contains all the evidence and all the exceptions of the plaintiff-appellant and of the defendant-respondent upon the trial; and that an order to that effect may be entered herein

permitting the plaintiff-appellant to file and settle the annexed bill of exceptions nunc pro tunc as of July 31, 1928.

Dated New York, November 19th, 1928.

Sansone & Gelb, Attorneys for the Plaintiff-Appellant. John M. Gibbons, Attorney for the Defendant-Respondent.

IN UNITED STATES DISTRICT COURT

ORDER SETTLING AND FILING TRANSCRIPT OF RECORD

Upon the foregoing stipulation and consent of the attorneys for the respective parties herein, it is hereby

Ordered, that the foregoing is a correct bill of exceptions of the said District Court in the above-entitled case, containing all the evidence and all the exceptions of plaintiff-appellant and defendant-respondent, upon the trial, and that the same be filed as the settled bill of exceptions nunc pro tunc as of July 31, 1928.

Dated New York, November 19th, 1928.

Walter C. Lindley, Judge of the United States District Court.

[fol. 68] IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS

Now comes the plaintiff, Victorio Nogueira, by his attorneys, Sansone & Gelb, and says, that in the record and proceedings in the above-entitled cause, there is manifest error which occurred upon the trial of said cause and upon which it will rely in its prosecution of the appeal in the above-entitled cause in this, to wit:

1. That the Trial Court erred in granting defendant's motion to dismiss the complaint and to non-suit the plaintiff at the close of the plaintiff's case. In that connection the following proceedings were had, to wit:

"Mr. Brumley: If your Honor please, I now move to dismiss upon the grounds before stated, and upon the further ground that the plaintiff failed to prove negligence on

the part of the defendant and on the further ground that from the plaintiff's own story that he assumed risks of—

* * * * * * *

The Court: This injury arose upon a boat on navigable waters, a boat of more than 18 tonnage. The Compensation Act passed by Congress provides compensation for disability or death, and in view of the nature of this Compensation Act, I am thoroughly convinced that this Court has no jurisdiction, and that this man's remedy is one of application under that compensation act. Therefore the motion to dismiss is granted.

[fol. 69] Mr. Sansone: I ask an exception, your Honor.

The Court: You may have an exception.

Wherefore the said Victorio Nogueira, the plaintiff, prays that the judgment herein for the error and proceeding aforesaid, may be reversed and annulled and altogether held for nothing, and that he, the said plaintiff, may be restored to all things which he has lost by occasion of said judgment.

Dated N. Y., October 2nd, 1928.

Sansone & Gelb, Attorneys for Plaintiff. Office and P. O. address: 233 Broadway, Borough of Manhattan, City of New York.

[fol. 70] Citation, in usual form, omitted in printing.

[fol. 71] In United States District Court

Stipulation for Filing Printed Record

It is hereby stipulated and agreed by and between the attorneys for the respective parties herein, that the foregoing printed record be filed for use by the Clerk in lieu of the original papers, in certifying a record on appeal.

Dated November 19th, 1928.

Sansone & Geld, Attorneys for Plaintiff-Appellant.

John M. Gibbons, Attorneys, for Defendant-Respondent.

IN UNITED STATES DISTRICT COURT

ORDER FOR FILING PRINTED RECORD

Upon the above stipulation, it is

Ordered that the foregoing printed record be filed for use by the Clerk in lieu of the original papers, in certifying a record on appeal.

Dated November 19, 1928.

Walter C. Lindley, U. S. D. J.

[fol. 72] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 73] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1928

No. 245

Argued March 6, 1929. Decided April 15, 1929

VICTORIO NOGUEIRA, Plaintiff-Appellant,

v.

NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY, Defendant-Appellee

Appeal from the District Court of the United States for the Southern District of New York

Before L. Hand, Swan, and Chase, Circuit Judges

OPINION

Suit under the Federal Employers' Liability Act (45 U. S. C. A. c. 2, §§ 51-59) to recover for personal injuries sustained by plaintiff while loading interstate freight upon defendant's car float in the East River, New York City. At the close of plaintiff's evidence, the complaint was dismissed for lack of jurisdiction, on the ground that plaintiff's remedy must be sought under the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927 (44 Stat.

1424; 33 U. S. C. A. §§ 901-950). From a judgment for defendant for costs, plaintiff appeals. Affirmed.

Sansone & Gelb, of New York City (Sol Gelb, of New York City, of counsel), for appellant.

John M. Gibbons, of New York City (E. R. Brumley and E. J. Moore, both of New York City, and J. Howland Gardner, of New Haven, Conn., of counsel), for appellee.

SWAN, Circuit Judge:

The plaintiff was employed by the defendant to work as a freight handler upon its docks and car floats. On October 13, 1927, at the time of sustaining the injuries complained of, he was working as one of a gang of freight handlers in loading heavy bales of paper, destined for transportation in interestate commerce, onto a 500-ton car float moored at Pier 42, East River. His work consisted in placing a bale of paper upon a hand truck and drawing it some 15 feet along the dock, and thence down an inclined plank which led from the dock to the car float. In going down the plank, he was expected to have the assistance of several other members of the gang. He went in front of the truck, holding its handles, while other at the rear were supposed to fasten hand hooks into the bale and help retard its progress. Due to their negligence, as he contends, the truck got out of control and skidded down the inclined plank, throwing him to the floor of the car float and falling on top of him in such a way as to crush his leg.

We may assume, as have the parties, that prior to the enactment of the Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C. A. §§ 901-950) a finding by the jury of negligence would have established in favor of the plaintiff a cause of action under the Employers' Liability Act (45 U. S. C. A. §§ 51-59). See Erie R. R. Co. v. Jacobus, 221 F. 335 (C. C. A. 3); The Passaic, 204 F. 266 (C. C. A. 2); The Erie Lighter 108, 250 F. 490 (D. C. N. J.); Southern Pacific Co. v. Jensen, 244 U. S. 205, 213, 37 S. Ct. 524, 61 L. Ed. 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E, 900. The dispute is whether compensation under the later statute has not now been made the sole relief which plaintiff may obtain.

This act provides a compulsory system of compensation for disability or death resulting from injury (irrespective

of the employer's fault) to employees in certain maritime employments. The statute is long, and it will suffice to refer to certain of its provisions, which appear pertinent to [fol. 74] the present inquiry. Section 3 provides that compensation shall be payable in respect to disability or death of an employee, but only if the injury occurs on navigable waters of the United States, and if recovery may not validly be provided by state compensation laws. It also excepts from the act certain employees, including "a master or member of a crew of any vessel," and "any person engaged by the master to load or unload or repair any small vessel under eighteen tons net." Employees of the above description are also expressly excluded from the definition of "employee" given in section 2(3). Section 4 declares that "every employer shall be liable for and shall secure [by insurance] the payment to his employees of the compensation payable under" later sections. Turning back to the definitional provisions (section 2), we find that "the term 'employer' means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry dock)." Section 5 relates to the exclusiveness of the compensation liability imposed by the act. It reads as follows:

"Sec. 5. The liability of an employer prescribed in section 4 shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death except that if an employer fails to secure payment of compensation as required by this act, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this act, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee."

These express provisions make it clear that, if the plaintiff had a right to compensation under the act, this right was exclusive of all others.

If the plaintiff's employment was maritime, it can scarcely be doubted that the conditions specified in section 3 are met. He was loading a vessel of more than 18 tons register, and was not the master nor a member of the crew. His injury occurred upon navigable waters. It was one for which recovery could not validly be provided by a state compensation law, if his employment was maritime. Northern Coal & Dock Co. v. Strand, 278 U. S. 142, 49 S. Ct. 88, 73 L. Ed. —. There the coal company maintained a dock on Superior Bay, Wisconsin. It employed regularly some 18 men, who worked, as directed, upon the dock or upon vessels made fast thereto for unloading. Strand was one of those so employed. He was killed while on a vessel, assisting in the discharge of her cargo. A judgment by the state Supreme Court, sustaining an award to his widow under the state Compensation Act, was reversed. In the opinion of Mr. Justice McReynolds it is said:

"Strand's employment contemplated that he should labor both upon the land and the water. When killed he was doing longshore or stevedore work on a vessel lying in navigable waters, according to his undertaking. His employment, so far as it pertained to such work, was maritime; the tort was maritime, and the rights of the parties must be ascertained upon a consideration of the maritime law. Southern Pacific Co. v. Jensen, 244 U. S. 205, 217 [37 S. Ct. 524, 61 L. Ed. 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E, 900]; Washington v. Dawson & Co., 264 U. S. 219 [44 S. Ct. 302, 68 L. Ed. 646]. * * * The unloading of a ship is not matter of purely local concern. It has direct relation to commerce and navigation, and uniform rules in respect thereto are essential. The fact that Strand worked for the major portion of the time upon land is unimportant. He was upon the water in pursuit of his maritime duties when the accident occurred."

There is, of course, no distinction, in respect to the matter now under consideration, between unloading and loading a vessel. Newham v. Chile Exploration Co., 232 N. Y. 37, 133 N. E. 120, 25 A. L. R. 1018; Atlantic Transport Co. v. Imbrovek, 234 U. S. 52, 61, 34 S. Ct. 733, 58 L. Ed. 1208,

51 L. R. A. (N. S.) 1157. These cases also tend strongly to prove that the plaintiff Nogueira, was engaged in maritime employment at the time of his injury. We have only to decide whether the fact that he was loading goods into cars on a car float makes his employment nonmaritime, whereas it would clearly have been maritime, had he been loading a barge or a lighter. The cars were to be carried [fol. 75] on the water after they were loaded. That later they will be pulled off and run on land would seem to furnish no more reason for a distinction than would the fact that goods loaded on a barge were later to be transshipped by rail. The statute expressly recognizes that the employment may be maritime only in part. We conclude that the employment was maritime, and that the defendant was liable for the payment of compensation as prescribed in section 4.

There remains to be considered the plaintiff's argument that the act was never intended to include railroad employees engaged in interstate commerce, because they already had a remedy under the Employers' Liability Act. The bill which resulted in the Longshoremen's and Harbor Workers' Compensation Act was reported by the Senate Judiciary Committee (Senate Report 973, 67 Cong. Rec. 10467), with a statement that its purpose was to provide for compensation, in the stead of liability, for a class of employees commonly known as longshoremen. For their protection congressional legislation was thought necessary, because of prior decisions by the Supreme Court. In Southern Pacific Co. v. Jensen, supra, it had been held that a stevedore employed by the Southern Pacific Company to unload one of its vessels, and injured thereon, was not entitled to compensation under the New York Workmen's Compensation Act (Consol. Laws, c. 67), because the state lacked power to legislate with respect to matters within the maritime jurisdiction of the United States. Congressional attempts (40 Stat. 395; 42 Stat. 634, 28 U. S. C. A. §§ 41(3), 371(3) by amendment of the Judicial Code to allow persons in maritime employment to claim rights and remedies under state compensation acts were held unconstitutional in Knickerbocker Ice Co. v. Stewart, 253 U. S. 149, 40 S. Ct. 438, 64 L. Ed. 834, 11 A. L. R. 1145, and Washington v. Dawson & Co., 264 U. S. 219, 44 S. Ct. 302, 68 L. Ed. 646. These and numerous related decisions

have been carefully reviewed by the Supreme Court in its very recent decision of London Guarantee & Accident Co. v. Industrial Accident Commission, 278 U. S. —, 49 S. Ct. 296, 73 L. Ed. —, decided April 8, 1929.

In the meantime seamen had been given by the Jones Act (41 Stat. 1007 [46 U. S. C. A. § 688]) the remedies accorded to railway employees under the Employers' Liability Act. Panama R. R. Co. v. Johnson, 264 U. S. 375, 44 S. Ct. 391, 68 L. Ed. 748; Engel v. Davenport, 271 U. S. 33, 46 S. Ct. 410, 70 L. Ed. 813. As a result the seamen were satisfied with their condition, and through their organized representative made known to Congress that they wished to remain outside the Longshoremen's and Harbor Workers' Compensation Act (68 Cong. Rec. 5908), and the bill as finally enacted excluded them. By the decision of International Stevedoring Co. v. Haverty, 272 U. S. 50, 47 S. Ct. 19, 71 L. Ed. 157, stevedores had been held to be seamen within the meaning of the Jones Act. Consequently they also had the rights and remedies of railway employees engaged in interstate commerce. They, however, were not excepted from the Longshoremen's and Harbor Workers' Compensation Act. On the contrary by reason of section 5, their only right in respect to disability or death from injury occurring upon navigable waters is now the right to compensation conferred by the Act. Chernick v. Clyde S. S. Co., 248 N. Y. 508, 162 N. E. 504; Obrecht-Lynch Corp. v. Clark, 30 F. (2d) 144, 146 (D. C. Md.) semble.

In the light of this legislative history it would seem impossible to construe the statute (assuming that its language is not so clear as to forbid construction) so as to exclude freight handlers who work on railway car floats, without also excluding longshoremen who work on other types of vesels. Both classes are within the letter of the statute; both had other rights and remedies before its passage. It may be noted that, in extending this statute to the District of Columbia, Congress expressly excepted railroad employees from its operation. 45 Stat. 600, 33 U. S. C. A. § 901, note.

The plaintiff argues that this construction will bring about confusion and inconsistencies; that a brakeman or engineer, if injured on the float, will have one remedy, and, if injured on the dock, another. But, as pointed out

in Resigno v. F. Jarka Co., 248 N. Y. 225, 234, 162 N. E. 13, under the Haverty Case and State Industrial Comm. v. Nordenholt Corp., 259 U. S. 263, 42 S. Ct. 473, 66 L. Ed. 933, 25 A. L. R. 1013, it was already common knowledge that the remedies available to a stevedore might vary from day to day, or even from hour to hour, and that a similar situation exists in the case of a railway employee, who gains or loses a remedy according to the particular service he is rendering at the very moment of his injury. Moreover, it does not follow that the mere locus of the accident [fol. 76] necessarily determines the right. A brakeman coupling cars upon a float, or an engineer driving his engine on a float bridge, may not be in maritime service just because he is over the water at the moment. See Cope v. Vallette Dry Dock Co., 16 F. 924, 925 (C. C. La.), aff'd, 119 U. S. 625, 7 S. Ct. 336, 30 L. Ed. 501. We do not say that he is not; we merely pass that problem until it shall arise.

Furthermore, adoption of the plaintiff's interpretation would drive us to the absurd result that a railroad employee loading intrastate freight upon a car float would also be excluded, and thus left without any statutory remedy. We conclude that railway employees employed in maritime employment cannot be excepted from the act.

The judgment is affirmed.

[fol. 77] In United States Circuit Court of Appeals, Second Circuit

Hon. Learned Hand, Hon. Thomas W. Swan, Hon. Harrie B. Chase, Circuit Judges

Victorio Nogueira, Plaintiff-Appellant,

v.

New York, New Haven & Hartford Railroad Company, Defendant-Appellee

Appeal from the District Court of the United States for the Southern District of New York

Decree—Filed April 22, 1929

This cause came on to be heard on the transcript of record from the District Court of the United States for

the Southern District of New York and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be, and it hereby is, affirmed, with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 78] [File endorsement omitted.]

[fol. 79] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 80] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 21, 1929

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 34,379. U. S. Circuit Court of Appeals, Second Circuit. Term No. 248. Victorio Nogueria, petitioner, vs. The New York, New Haven & Hartford Railroad Company. Petition for writ of certiorari and exhibit thereto. Filed July 15, 1929. File No. 34,379.

FILE COPY

JUL 15 1929
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

No. 248

VICTORIO NOGUEIRA, PETITIONER,

vs.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

HUMPHREY J. LYNCH,
Counsel for Petitioner.

(34,379)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929.

No. 248

VICTORIO NOGUEIRA, PETITIONER,

vs.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Supreme Court of the United States:

The petition of VICTORIO NOGUEIRA respectfully shows to this Honorable Court as follows:

The petitioner brought this action under the Federal Employers' Liability Act, to recover damages for personal injuries sustained by him through the negligence of the Railroad Company while in its employ as a freight handler. The Railroad Company was an interstate carrier and the petitioner at the time he was hurt was engaged in the furtherance of the carrier's

business of interstate commerce (fol. 60). At the time he was hurt, he was working on a railroad float lying in the East River, New York Harbor, loading freight into the freight cars situated on the float (fols. 61, 73, 77, 79).

The Trial Judge dismissed petitioner's complaint, holding that the Federal Employers' Liability Act was not applicable to this case, on the ground that it was supplanted by the Longshoremen's & Harbor Workers' Compensation Act of March 4, 1927 (44 Stat. 1424; 33 U. S. C. A. 901-950). This Act provides for compensation for certain maritime employees injured while working in navigable waters, and makes the acceptance of compensation compulsory and exclusive of any right at law or in admiralty for such injury.

Petitioner appealed from the judgment in favor of the respondent, to the Circuit Court of Appeals, for the Second Circuit, assigning as error the Trial Court's dismissal of petitioner's complaint. The Circuit Court of Appeals affirmed the judgment entered on the dismissal of the Trial Judge, holding in effect, that the Longshoremen's & Harbor Workers' Compensation Act supplanted the Federal Employers' Liability Act in so far as it referred to railway employees engaged in maritime employment.

So far as is material, the facts in your petitioner's case may be stated as follows:

While using a hand truck and carrying a bale of paper weighing approximately 1,200 pounds, from the dock on to the float, the bale, together with the truck

were permitted to fall upon petitioner, causing him to sustain a compound fracture of his leg (fols. 82, 88, 89). To truck the bale from the dock on to the float, it was necessary to move it over a plank running from the dock to the float (fol. 83). Since the tide was low and the float was several feet lower than the dock, this plank was at a fairly steep incline (fols. 86, 87). It was therefore necessary, when moving this truck over the plank, to have several men fasten hand hooks into the bale while it was being moved down the plank by the plaintiff (fols. 94, 95). For this purpose, there were four or five men who were assigned to help the petitioner bring this truck and bale down the plank on to the float. They stuck their hooks into the bale for the purpose of retarding the speed with which it would descend down the plank, but as the petitioner started down, these men let go with their hooks and failed to hold the bale, with the result that the truck and the bale skidded down the plank, throwing the petitioner to the floor and crushing his leg beneath it (fols. 95-105).

On these facts, the petitioner was prepared to predicate negligent conduct on the part of the respondent.

It was admitted by the carrier that the bale which the petitioner was moving was a piece of interstate freight destined from New York to Connecticut (fol. 60). This fact, of course, establishes the interstate character of petitioner's employment. B. & W. S. S. Ry. Co. *v.* Burtch, 263 U. S. 540; Ill. Central Ry. *v.* Porter, 207 Fed. 311, C. C. A., 6th Cir.

With these facts proved, there was no warrant for supposing that petitioner's remedy, so clearly defined and established by a long line of decisions, was not governed by the Federal Employers' Liability Act. Indeed, the holding is the first of its kind in a court of record. The appeal to the Circuit Court of Appeals was based on the point that the Longshoremen's & Harbor Workers' Compensation Act had no application to petitioner in this case; that it was never intended to have any application to one in petitioner's position, and that the whole meaning of the Statute is distorted by any such interpretation as we have in the case at bar.

Petitioner also contended that it was never the intent of Congress, in enacting this Statute, to make it applicable to railway employees engaged in interstate commerce; that the wording of the Statute is not sufficiently broad to include interstate railway employees, and that the term "maritime employment" was not intended to cover those employees engaged in an adjunct to transportation by rail.

Your petitioner submits that this petition for a writ of certiorari should be granted for the following reasons:

1st. The petitioner having been engaged in the furtherance of the carrier's business of interstate commerce, and the Railroad Company being an interstate carrier, the case is governed by the Federal Employers' Liability Act.

2nd. The decision of the Circuit Court of Appeals, making the Longshoremen's & Harbor Workers' Com-

pensation Act applicable to the petitioner herein, gives the latter Statute the effect of a repeal of the Federal Employers' Liability Act, although there is not a word in the Statute to indicate that such a repeal was contemplated, even by implication.

3rd. That a repeal of a Statute by implication is not favored by this Court.

4th. That the question arising in this case has never been determined before by this Court, and the decision of the Circuit Court of Appeals is the first holding of an Appellate Court on the subject.

Your petitioner presents herewith as part of this petition a brief of the law upon the question involved, and a certified transcript of the record of the Circuit Court of Appeals.

WHEREFORE your petitioner respectfully prays that a writ of certiorari may issue out of and under the seal of this Court, directed to the Circuit Court of Appeals for the Second Circuit, commanding said Court to certify and send to this Court upon a day certain, to be therein designated, a full transcript of the record of all the proceedings of the said Circuit Court of Appeals in this case, which was entitled in that court "Victorio Nogueira, Appellant, against The New York, New Haven and Hartford Railroad Company, Respondent," to the end that said cause may be reviewed and determined by this Court as required by law, and that your petitioner may have such other and further

remedy in the premises as to this Court may seem appropriate, and that the judgment of said Circuit Court of Appeals may be reversed by this Honorable Court.

VICTORIO NOGUEIRA,
By HUMPHREY J. LYNCH,
His Counsel.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

No. 248

VICTORIO NOGUEIRA, PETITIONER,

vs.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, RESPONDENT.

BRIEF ON BEHALF OF VICTORIO NOGUEIRA IN SUPPORT OF HIS PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT.

This cause came before the Circuit Court of Appeals, for the Second Circuit, on an appeal from a judgment of the United States District Court, for the Southern District of New York, in favor of the respondent. The judgment was affirmed by the Circuit Court of Appeals.

Point I.

The District Court and the Circuit Court of Appeals erred in holding that the "Longshoremen's & Harbor Workers' Compensation Act" applied to a railway employee engaged in interstate commerce.

The title of the Statute is, "An Act to Provide Compensation for Disability or Death Resulting from Injury to Employees in Certain Maritime Employments and for other Purposes." The short title is, "Longshoremen's & Harbor Workers' Compensation Act." The sections of the Act which are relevant to the situation here are Subdivisions 3 and 4 of Section 2.

Subdivision 3 of Section 2 reads as follows:

> "The term 'employee' does not include a master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net."

It should be noted that the definition of "employee," as contained in the statute, is a negative one. It does not define who are "employees," but merely excludes Seamen. However, under Subdivision 4, Section 2, the definition of "employer" seems to furnish some information as to who are "employees." It reads as follows:

> "The term 'employer' means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry dock)."

The statute being a compulsory compensation statute, makes it obligatory upon an employer, any of whose employees are employed in maritime employment, to conform thereto. It would also seem that any employee engaged in maritime employment, would necessarily be bound by this statute.

It is plain however, that the act has reference to longshoremen and harbor workers engaged in maritime employment. If an employee of a railway carrier engaged in an adjunct of transportation by rail, or engaged in work such as the petitioner was doing in this case, is deemed to be employed in a maritime pursuit within the meaning of the statute, then the act is of course applicable. Our contention, however, has been that employment in interstate commerce in an adjunct to transportation by rail is not maritime employment within the meaning of this statute. We find authority for this statement from an expression of opinion by this Court in *Southern Pacific Co. v. Jensen*, 244 U. S. 207.

In that case, one of the reasons for the Southern Pacific Co.'s objection to the application of the New York State Compensation Law to a longshoreman, was that it was a common carrier by railroad, and that such longshoreman was engaged in interstate commerce. This Court, however, held that although the Southern Pacific Co. was a common carrier by railroad, in its transaction of business as an operator of ocean-going ships, it is not acting as a common carrier by railroad, and consequently the employee who was injured in loading one of their vessels was engaged

in maritime employment and not in any work having direct or substantial connection with railroad operations. Let us examine the extract from that decision (p. 213):

> "Evidently the purpose was to prescribe a rule applicable where the parties are engaging in something having direct and substantial connection with railroad operations, and not with another kind of carriage recognized as separate and distinct from transportation on land and no mere adjunct thereto. It is unreasonable to suppose that Congress intended to change long-established rules applicable to maritime matters merely because the ocean-going ship concerned happened to be owned and operated by a company also a common carrier by railroad. The word 'boats' in the statute refers to vessels which may be properly regarded as in substance but part of a railroad's extension or equipment as understood and applied in common practice."

The significance of this expression on the part of the Court, is that the Court has recognized that there is a distinction between one engaged in employment on navigable waters for a common carrier, engaged in carriage recognized as separate and distinct from transportation on land, and one engaged in employment on navigable waters for a common carrier in carriage which is an adjunct to transportation by rail. For that reason, the longshoreman in the cited case, who was engaged in a distinctly maritime employment, did not come within the Federal Employers' Liability Act.

The wording of the Federal Employers' Liability Act, specifically referring to the word "boats" contained therein, indicates, as this Court pointed out, that in the application of the Act, employment on navigable waters in connection with transportation by rail, was not to be considered maritime with the same provenience as the word is used in connection with longshoremen.

It has always been held that employees of a common carrier engaged on navigable waters in an adjunct to transportation by rail come within the Federal Employers' Liability Act.

Erie R. Co. v. Jacobus, 221 Fed. 335; C. C. A. 3rd Cir.

The Passaic, 204 Fed. 266.

Section 5 of the Statute relates to the exclusiveness of the compensation liability imposed by the Act. It reads as follows:

> "The liability of an employer prescribed in section 4 shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this Act, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this Act, or to maintain an action at law or in admiralty for damages on account of such

> injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee."

The Circuit Court of Appeals interpreted this section to mean that "exclusive of any right at law or in admiralty" means exclusive of the right under the Federal Employers' Liability Act. This interpretation was based upon the theory that the petitioner herein was engaged in maritime employment within the meaning of this compensation statute.

The wording of the latter part of the section—wherein it provides that upon the employer failing to secure payment of compensation, the injured employee has his election to claim compensation or to maintain an action at law or in admiralty, and in such an action the defendant may not plead that the injury was caused by the negligence of a fellow-servant—indicates that the Act was not intended to apply to railway employees engaged in interstate commerce, for common carriers were never permitted to plead such defense in an action under the Federal Employers' Liability Act. This part of the section purports to add something to the rights of railway employees and to take away a defense from the carrier. With respect to railway employees, it adds nothing to their rights, and with respect to the carrier, takes nothing away.

The Act also provides that the defense of assumption of risk is unavailable where the employer has failed to secure the payment of compensation.

To a railway employee engaged in interstate commerce, injured through a violation of a Safety Statute, the carrier cannot interpose the defense of assumption of risk. If a railway employee were injured on a railroad float lying in navigable waters, through a violation of a Safety Statute, the defense of assumption of risk would not be available to the carrier. The Statute, therefore, is meaningless in that respect, insofar as railway employees engaged in interstate commerce are concerned.

These attributes of the Statute indicate that it was intended to apply to that class of maritime employees who merely had a right of action at common law. By the interpretation given to the Statute by the Circuit Court of Appeals, it in effect repeals in part, not only the Federal Employers' Liability Act, but the Safety Appliance Act, and the Boiler Inspection Act, for employees injured on a railroad float in navigable waters, by reason of a violation of these statutes, must necessarily come within this compensation statute if the decision is carried to its logical conclusion.

Point II.

The intention of Congress was to provide compensation for longshoremen and other maritime employees, and not for railway employees engaged in interstate commerce.

Statements contained in the report of the Judiciary Committee of the Senate (Senate Report 973, page 10467, 69th Congress) indicate that the Act was in-

tended to provide for compensation for a class of employees known as "longshoremen." Statements made in the course of debate in the Senate indicate that the bill was designed to relieve longshoremen and others engaged in maritime pursuits, from the rigors of the common law, and to remedy the situation of this class of employees in conformity with the suggestion made by this Court in *Washington v. Dawson & Co.*, 264 U. S. 219.

The Bill as originally prepared was so drawn as to include seamen (Senate Bill 3170, 69th Congress, page 4119). At the same session of Congress on March 2, 1927, passage of the Bill was debated in the House of Representatives (pages 5402-5414), and Section 2, subdivision 3, was so amended as to exclude seamen. Passage of the Bill was also debated in the Senate on March 4, 1927 (pages 5900-5909), and explanation was made by the Chairman of the Judiciary Committee as to why seamen were excluded from the Act. The Act, as it now stands, specifically excludes seamen from its operation.

Bearing in mind the fact that seamen injured through negligence, enjoy the same privileges as railway employees engaged in interstate commerce, and occupy the same position with respect to their rights and remedies under the law, their original specific inclusion in the Bill becomes very significant. If the intention was at any time to include railway employees, it would seem that some reference in the Bill as originally drawn would have been made to railway employees engaged in interstate commerce.

Point III.

The interpretation given to the statute by the Circuit Court of Appeals leads to inconsistencies and confusion in the rights and remedies of railway employees engaged in interstate commerce, contrary to the intent of Congress.

Petitioner contended before the Circuit Court of Appeals that if it were held that this Compensation Statute applied to him, it would in effect amount to a holding that all railway employees injured while working on a car float in navigable waters, whether they be brakemen, locomotive engineers, conductors or other railway employees, would be deprived of their right of action under the Federal Employers' Liability Act. And if injured through a violation of the Safety Appliance Act or Boiler Inspection Act, they would be deprived of their rights under these Statutes. For, if petitioner was engaged in maritime employment, then a brakeman engaged in loading railroad cars on to a railroad float, is necessarily engaged in the same kind of employment. There is hardly a distinction between loading railroad cars on to a float, and loading package freight into the cars situated on the float.

This question the Circuit Court of Appeals passed by without deciding. And yet it seems to petitioner that a decision of this question was indispensable to the correct disposition of the problem arising with regard to petitioner's case.

This Court has recognized that the Federal Employers' Liability Act applies to those employees,

whether working on land or on water, engaged in transportation by rail or in an adjunct thereto, in the furtherance of the carrier's business of interstate commerce. In the past, it has held that a freight handler comes within the Federal Employers' Liability Act. *B. & W. SS. Ry. Co. v. Burtch,* 263 U. S. 540. It is therefore difficult to perceive how an arbitrary distinction can be made between a freight handler and a brakeman.

Perhaps no distinction has been made by the Circuit Court of Appeals, but at any rate, if the brakeman be deemed to come within the Compensation Statute, then it is apparent that the Statute has a repealing effect upon the Federal Employers' Liability Act, which is far reaching in scope, and hardly in consonance with the policy of Congress to directly legislate with regard to railway employees engaged in interstate commerce.

Furthermore, repeals by implication are not favored by this Court.

McCool v. Smith, 66 U. S. 419.
United States v. Greathouse, 166 U. S. 601.
Cope v. Cope, 137 U. S. 682.

Conclusion.

IT IS RESPECTFULLY SUBMITTED THAT BECAUSE OF THE FOREGOING, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

HUMPHREY J. LYNCH,
Counsel for Petitioner.

(8415)

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CHARLES ELMORE CRO
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Supreme Court of the United States.

OCTOBER TERM, 1929.

No. 248.

VICTORIO NOGUEIRA,

Petitioner,

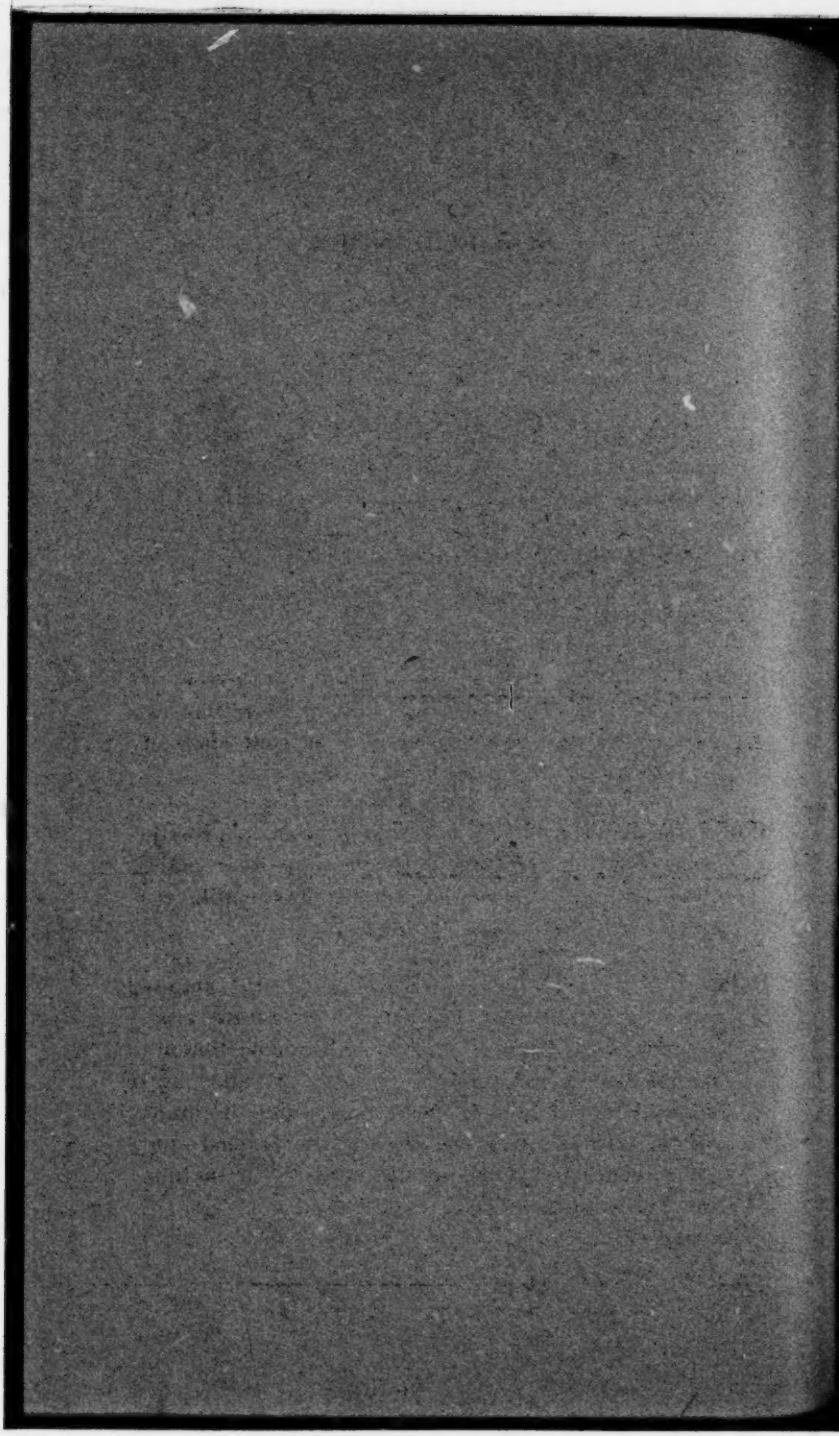
—against—

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY.

BRIEF IN SUPPORT OF WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Humphrey J. Lynch,
SOL GELB,
Counsel for Petitioner.

THE COURT PRESS—Law Printers—47 West Street—Bowling Green 9230-1-4



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VICTORIO NOGUEIRA,

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—against—

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY.

BRIEF IN SUPPORT OF WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

I.

The Opinions of the Court Below.

The District Court dismissed petitioner's complaint, rendering no reported opinion (R. 52).

The Circuit Court of Appeals affirmed the judgment of the District Court, and rendered an opinion (R. 55-61); reported *Nogueira* v. *N. Y., N. H. & H. R. Co.*, 32 Fed (2nd) 17?.

II.

Jurisdiction.

The point presented in this case involves the interpretation of a Federal statute, namely, the Longshoremen's

& Harbor Workers' Compensation Act, 33 U. S. C. A., Sections 901-950.

This Court granted petitioner's application for a writ of certiorari on October 21, 1929 (R. 62).

III.

Statement of the Case.

The petitioner brought this action under the Federal Employers' Liability Act, to recover damages for personal injuries sustained by him through the negligence of the railroad company, while in its employ as a freight handler. The railroad company was an interstate carrier and the petitioner, at the time he was hurt, was engaged in the furtherance of the carrier's business of interstate commerce (R. 13).

At the time he was hurt, he was working on a railroad float lying in the East River, New York Harbor, loading freight into freight cars situated on the float. The trial Judge dismissed petitioner's complaint, holding that the Federal Employers' Liability Act was not applicable to this case, because of the existence of the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927 (44 Stat. 1424; 33 U. S. C. A. 901, 950). This act provides for compensation for certain maritime employees injured while working on navigable waters, and makes the acceptance of compensation compulsory and exclusive of any right at law or in admiralty for such injury.

The Circuit Court of Appeals upheld the dismissal of the trial Judge, holding in effect that the Longshoremen's and Harbor Workers' Compensation Act supplanted the Federal Employers' Liability Act in so far as it

referred to railway employees engaged in maritime employment.

So far as is material, the facts in petitioner's case may be stated as follows:

Petitioner was working at Pier 42, East River, as part of a gang of freight handlers loading freight into freight cars situated on a railroad float lying in the East River (R. 13, 17, 18). While using a hand truck in carrying a bale of paper weighing approximately 1,200 pounds, from the dock on to the float, the bale, together with the truck, were permitted to fall upon petitioner, causing him to sustain personal injuries (R. 19, 21, 22).

To truck the bale from the dock onto the float, it was necessary to move it over a plank running from the dock to the float (R. 20). Since the tide was low and the float was several feet lower than the dock, this plank was at a fairly steep incline (R. 21). It was therefore necessary, when moving this truck over the plank, to have several men fasten hand hooks into the bale, while it was being moved down the plank by petitioner (R. 23). For this purpose, there were four or five men who were assigned to help the petitioner bring this truck and bale down the plank onto the float. They stuck their hooks into the bale for the purpose of retarding the speed with which it would descend down the plank, but as the petitioner started down, these men let go with their hooks and failed to hold the bale, with the result that the truck and the bale skidded down the plank, throwing the petitioner to the floor and crushing his leg beneath it (R. 23-26).

Upon these facts, the petitioner was prepared to predicate negligent conduct on the part of the respondent.

It was admitted by the carrier that the bale which petitioner was moving was a piece of interstate freight destined from New York to Connecticut (R. 13). This fact, of course, establishes the interstate character of petitioner's employment. *B. & W. S. S. Ry. Co.* v. *Burtch*, 263 U. S. 540; *Ill. Central Ry.* v. *Porter*, 207 Fed. 311, C. C. A., 6th Cir.

Under this state of facts, the petitioner's right to maintain an action under the Federal Employers' Liability Act, has heretofore been settled. *B. & W. S. S. Ry. Co.* v. *Burtch, supra; Illinois Central Ry.* v. *Porter, supra; Erie R. R. Co.* v. *Jacobus*, 221 Fed. 335 (C. C. A. 3).

IV.

Specification of Errors.

The District Court and the Circuit Court of Appeals erred in holding that the Longshoremen's and Harbor Workers' Compensation Act applied to petitioner, a railway employee engaged in interstate commerce.

V.

Argument.

POINT I.

The wording of the statute is barren of any reference to interstate railway employees, and its substance does not include that class of employees.

The title of the statute is, "An Act to Provide Compensation for Disability or Death Resulting from Injury to Employees in Certain Maritime Employments and for other Purposes." The short title is, "Longshoremen's and Harbor Workers' Compensation Act." The sections of the act which are relevant to the situation here are subdivisions 3 and 4 of Section 2.

Subdivision 3 of Section 2 reads as follows:

> "The term 'employee' does not include a master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net."

It should be noted that the definition of "employee" as contained in the statute, is a negative one. It does not define who are "employees", but merely excludes seamen. However, under subdivision 4, Section 2, the definition of "employer" seems to furnish some information as to who are "employees". It reads as follows:

> "The term 'employer' means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry dock)."

The statute being a compulsory compensation statute, makes it obligatory upon an employer, any of whose employees are employed in maritime employment, to conform thereto. It would also seem that any employee engaged in maritime employment, would necessarily be bound by this statute.

It is plain, however, that the act has reference to longshoremen and harbor workers engaged in maritime employment. If an employee of a railway carrier engaged in an adjunct of transportation by rail, or engaged in work such as the petitioner was doing in this case, is deemed to be employed in a maritime pursuit within the meaning of the statute, then the act is of course applicable. Our contention, however, has been that employment in interstate commerce in an adjunct to transportation by rail is not maritime employment within the meaning of this statute. We find authority for this statement from an expression of opinion by this Court in *Southern Pacific Co.* v. *Jensen*, 244 U. S. 207.

In that case, one of the reasons for the Southern Pacific Co.'s objection to the application of the New York State Compensation Law to a longshoreman, was that it was a common carrier by railroad, and that such longshoreman was engaged in interstate commerce. This Court, however, held that although the Southern Pacific Co. was a common carrier by railroad, in its transaction of business as an operator of ocean-going ships it was not acting as a common carrier by railroad, and consequently the employee who was injured in loading one of their vessels was engaged in maritime employment and not in any work having direct or substantial connection with

railroad operations. Let us examine the extract from that decision (p. 213):

> "Evidently the purpose was to prescribe a rule applicable where the parties are engaging in something having direct and substantial connection with railroad operations, and not with another kind of carriage recognized as separate and distinct from transportation on land and no mere adjunct thereto. It is unreasonable to suppose that Congress intended to change long-established rules applicable to maritime matters merely because the ocean-going ship concerned happened to be owned and operated by a company also a common carrier by railroad. The word 'boats' in the statute refers to vessels which may be properly regarded as in substance but part of a railroad's extension or equipment as understood and applied in common practice."

The significance of this expression on the part of the Court, is that the Court has recognized that there is a distinction between one engaged in employment on navigable waters for a common carrier engaged in carriage recognized as separate and distinct from transportation on land, and one engaged in employment on navigable waters for a common carrier in carriage which is an adjunct to transportation by rail. For that reason, the longshoreman in the cited case, who was engaged in a distinctly maritime employment, did not come within the Federal Employers' Liability Act.

The wording of the Federal Employers' Liability Act, specifically referring to the word "boats" contained therein, indicates, as this Court pointed out, that in the application of the Act, employment on navigable waters in connection with transportation by rail, was not to be

considered maritime with the same provenience as the word is used in connection with longshoremen.

It has always been held that employees of a common carrier engaged on navigable waters in an adjunct to transportation by rail come within the Federal Employers' Liability Act.

Erie R. Co. v. *Jacobus,* 221 Fed. 335; C. C. A. 3rd Cir.;
The Passaic, 204 Fed. 266.

Section 5 of the Statute relates to the exclusiveness of the compensation liability imposed by the Act. It reads as follows:

> "The liability of an employer prescribed in section 4 shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this Act, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this Act, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee."

The Circuit Court of Appeals interpreted this section to mean that "exclusive of any right at law or in ad-

miralty" means exclusive of the right under the Federal Employers' Liability Act. This interpretation was based upon the theory that the petitioner was engaged in maritime employment within the meaning of this compensation statute.

The wording of the latter part of the section—wherein it provides that upon the employer failing to secure payment of compensation, the injured employee has his election to claim compensation or to maintain an action at law or in admiralty, and in such an action the defendant may not plead that the injury was caused by the negligence of a fellow-servant—indicates that the Act was not intended to apply to railway employees engaged in interstate commerce, for common carriers were never permitted to plead such defense to defeat a recovery in an action under the Federal Employers' Liability Act. This part of the section purports to add something to the rights of railway employees and to take away a defense from the carrier. With respect to railway employees, it adds nothing to their rights, and with respect to the carrier, takes nothing away.

The Act also provides that the defense of assumption of risk is unavailable where the employer has failed to secure the payment of compensation.

To a railway employee engaged in interstate commerce, injured through a violation of a Safety Statute, the carrier cannot interpose the defense of assumption of risk (Federal Employers' Liability Act, Sec. 4). If a railway employee were injured on a railroad float lying in navigable waters, through a violation of a Safety Statute, the defense of assumption of risk would not be available to the carrier. The statute, therefore, is meaningless in that respect, in so far as railway employees engaged in interstate commerce are concerned.

These attributes of the Statute indicate that it was intended to apply to that class of maritime employees who merely had a right of action at common law.

POINT II.

The intention of Congress was to provide compensation for longshoremen and other maritime employees, and not for railway employees engaged in interstate commerce.

The bill first came before the Senate as Senate Bill No. 3170, on February 17, 1926, in the First Session of the 69th Congress (p. 4119). It was referred to the Judiciary Committee. The Committee reported to the Senate on June 2, 1926 (Senate Report 973, p. 10467), and in the report there is contained the following statement:

> "The purpose of this bill is to provide for compensation, in the stead of liability, for a class of employees commonly known as 'Longshoremen'. These men are mainly employed in loading, unloading, refitting and repairing ships; but it should be remarked that injuries occurring in loading or unloading are not covered unless they occur on the ship or between the wharf and the ship, so as to bring them within the Maritime jurisdiction of the United States. There are in the neighborhood of 300,000 men so employed in the entire country."

This statement makes it plain that the bill was designed to cover a class of employees engaged in maritime pursuits, such as "loading, unloading, refitting and repairing ships", and requires little comment. On June 3, 1926, consideration of the bill was before the Senate

(pp. 10608-10614) and Senator Walsh, one of the members of the Judiciary Committee, speaking for the passage of the bill, made the following statement (p. 10614):

> "Mr. President, I hope the bill will have the consideration of the Senate. It is a very important measure. Under various decisions of the Supreme Court of the United States, those who are generally known as Longshoremen are not permitted to receive the benefit of the Workmen's Compensation Acts passed by the various States, the Supreme Court holding that they belong to the Maritime service and are, therefore, under the exclusive jurisdiction of the Congress of the United States. When that decision was rendered, Congress passed an Act, the purpose of which was to bring such workmen under the State acts, but the Supreme Court again held that such legislation was beyond the power of Congress. So it becomes necessary to enact a special Compensation Act for workmen of that class."

In this statement, the Senator speaks of the United States Supreme Court denying to longshoremen the right to compensation under various State Acts and the futile attempt by Congress, to remedy this situation by the passage of an act which was also held ineffectual by the United States Supreme Court. What he had in mind by this expression is apparent.

The U. S. Supreme Court, in *Southern Pacific Co.* v. *Jensen*, 244 U. S. 207, held that a longshoreman, injured while working in navigable waters in the State of New York, was not entitled to compensation under the Workmen's Compensation Act of the State of New York, the basis of the holding being founded on the principle that

the injured man's employment was maritime in nature and had direct relation to navigation or commerce. That therefore, the State of New York had no power to legislate with respect to admiralty matters affecting the maritime jurisdiction of the United States. In the decision, it was stated that Congress alone had the power to legislate with regard to this subject. Accordingly, therefore, Congress legislated by the passage of an act undertaking to amend the provisions of Sections 24 and 256 of the Judicial Code (Act of October 6, 1917, Chapter 97, 40 Stat. At. L. 395, Comp. Stat. Sec. 991 (3) Fed. Stat. Anno. Supp. 1918, page 401).

The sections sought to be amended were those which save to suitors in all civil causes of admiral.y and maritime jurisdiction "the right of a common law remedy where the common law is competent to give it". These sections were amended by adding to them the words, "and to claimants the rights and remedies under the Workmen's Compensation Law of any state". The purpose of this amendment was to permit application of the Workmen's Compensation Laws of the several states to injuries falling within the admiralty and maritime jurisdiction. In *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149, the United States Supreme Court declared this Act unconstitutional and beyond the power of Congress. It held that only Congress had the right to legislate with regard to maritime matters and that it was not empowered to delegate it to others.

Again an attempt was made to remedy the situation by amending Sections 24 and 256 of the Judicial Code, by adding the words, "and to claimants for compensation for injuries to or death of persons other than the master or members of the crew of a vessel, their rights and

remedies under the Workmen's Compensation Law of any state, district, territory or possession of the United States". This amendment was substantially similar to that of 1917, except that it excluded seamen from the operation of the Act.

The United States Supreme Court, in *Washington* v. *Dawson & Co.*, 264 U. S. 219, declared this enactment unconstitutional and beyond the powers of Congress. The reasoning was the same as that in the *Stewart* case, *supra*, and in effect expressed the opinion that Congress had the power to alter or revise the maritime law by statutes of general application, but it could not delegate that power to the several states.

We need only quote one short extract of the United States Supreme Court decision to show to what extent Congress was influenced by the opinion of the Court in the passage of the Act under discussion here (p. 227):

> "Without doubt, Congress has power to alter, amend, or revise the maritime law by statutes of general application embodying its will and judgment. This power, we think, would permit enactment of a general employers' liability law, or general provisions for compensating injured employees; but it may not be delegated to the several states. The grant of admiralty and maritime jurisdiction looks to uniformity; otherwise wide discretion is left to Congress. *Knickerbocker Ice Co.* v. *Stewart.* Exercising another power,—to regulate commerce,—Congress has prescribed the liability of interstate carriers by railroad for damages to employees (Act April 22nd, 1908, chap. 149, 35 Stat. at L. 65, Comp. Stat. Sec. 8657, 8 Fed. Stat. Anno. 2d ed., p. 1208), and thereby

abrogated conflicting local rules. *New York C. R. Co.* v. *Winfield,* 244 U. S. 147, 61 L. ed. 1045, L. R. A. 1918 C, 439, 37 Sup. Ct. Rep. 546, Ann. Cas. 1917 D, 1139, 13 N. C. C. A. 680."

When Senator Walsh, in speaking for the passage of the act in question, said, "So it becomes necessary to enact a special compensation act for workmen of that class", he was merely stating that the bill was an adoption of one of the two suggestions made by the United States Supreme Court in its decision. The decision speaks of the power to enact a general employers' liability law, and the power to provide for compensating injured employees.

From this short analysis of the acts of Congress and the decisions interpreting those acts which led to the enactment of the statute in question, it is obvious that the intention of Congress was to legislate to remedy conditions with respect to longshoremen injured while on navigable waters. Certainly, it had no intention of legislating with respect to railway employees engaged in interstate commerce, when by the very opinion of the U. S. Supreme Court, which was followed by Congress, it is stated that "Exercising another power,—to regulate commerce,—Congress has prescribed the liability of interstate carriers by railroad for damages to employees * * * and thereby abrogated conflicting local rules."

The U. S. Supreme Court says, Congress has already legislated with regard to railway employees engaged in interstate commerce, and what they should do if they want to legislate effectively with regard to longshoremen, is either to pass a similar Employers' Liability Act, or a compensation statute for such employees. Such a

statute is introduced, the purpose of it is explained to the body of Congress by one of its sponsors; its purpose, it is said, is to enact a special compensation act for longshoremen, and yet, with all these patent facts, by the decision of the lower Court, we find it applied to another class of employees.

And as further evidence of the intention of Congress not to include railway employees, it is well to note that when the bill was first introduced, it was so drawn as to include seamen. On January 14, 1927, in the second session of the 69th Congress, the House Judiciary Committee submitted a report (House Report 1767, p. 1687), the purport of which was substantially to the same effect as the Senate Committee Report, and the bill also referred to seamen in addition to longshoremen. At the same session of Congress on March 2, 1927, passage of the bill was debated (pp. 5402-5414), and Section 2, subdivision 3 was so amended as to exclude seamen. The bill was passed at that time in the House of Representatives, as amended.

On March 4, 1927, passage of the bill was debated in the Senate (pp. 5900-5909). Some reference was then made to the fact that the bill as returned from the House, was different from the original bill in that seamen were excluded, and Senator Norris, Chairman of the Judiciary Committee, explained why the seamen were omitted (p. 5908):

> "Mr. Norris: The seamen, through their organized representative, Mr. Furuseth, wanted to remain out. They were satisfied with their condition and did not want to be included in this law."

When we bear in mind the fact that by Section 33 of the Merchant Marine Act, seamen, injured through negligence, were given the same rights as railroad employees enjoyed under the Federal Employers' Liability Act, and that both seamen and railway employees engaged in interstate commerce, occupy the same position with respect to their rights and remedies under the law, (*Panama R. Co.* v. *Johnson,* 264 U. S. 375; *Engel* v. *Davenport,* 271 U. S. 33), then the inclusion of seamen in the bill as originally drawn, becomes very significant.

If Congress intended at any time to include railway employees, why wouldn't they include in the wording of the bill, some reference to railway employees engaged in interstate commerce? Seamen occupy the same position as railway employees with regard to their remedies, and when the intention first was to include the seamen, the bill was so worded as to make direct and specific reference to them. Obviously, the intention of Congress was not to include railway employees.

Stronger evidence of the intent of Congress is found in the fact that in 1928 it passed an act providing for workmen's compensation for employees in the District of Columbia. (Act of May 17, 1928, 45 Stat. 600; 33 U. S. C. A. Sec. 901, note.) This Act in part, provided as follows, Section 901:

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the provisions of the Act entitled 'Longshoremen's and Harbor Workers' Compensation Act,' approved March 4, 1927, including all amendments that may hereafter be made thereto, shall apply in respect to the injury or death of an employee of an employer

carrying on any employment in the District of Columbia, irrespective of the place where the injury or death occurs; except that in applying such provisions the term 'employer' shall be held to mean every person carrying on any employment in the District of Columbia, and the term 'employee' shall be held to mean every employee of any such person.

Sec. 2. *This Act shall not apply in respect to the injury or death of* (1) a master or member of a crew of any vessel; (2) *an employee of a common carrier by railroad when engaged in interstate or foreign commerce or commerce solely within the District of Columbia;* (3) an employee subject to the provisions of the Act entitled 'An Act to provide compensation for employees of the United States suffering injuries while in the performance of their duties, and for other purposes,' approved September 7, 1916, as amended; and (4) an employee engaged in agriculture, domestic service, or any employment that is casual and not in the usual course of the trade business, occupation, or profession of the employer.

Sec. 3. This Act shall take effect July 1, 1928." (Italics ours.)

It is to be observed that Congress, in enacting a workmen's compensation statute for the District of Columbia, made applicable the provisions of the Longshoremen's & Harbor Workers' Compensation Act to this enactment, and specifically exempted the application of the statute to employees of common carriers by railroad engaged in interstate commerce. Admittedly, this statute does not cover a railway employee engaged in interstate commerce, although working in navigable waters. The in-

tention of Congress, in passing this statute, was apparently not to legislate with regard to railway employees engaged in interstate commerce.

In the light of this obvious purpose, it is difficult to find any intention on the part of Congress, to legislate with regard to railway employees engaged in interstate commerce, in the Longshoremen's & Harbor Workers' Compensation Act.

It may be contended that the inclusion of Section 2 of the Act relating to the District of Columbia, and the absence of any such provision in the Longshoremen's Act, indicates just the contrary of our premise. But the answer to such contention, if made, is that Congress, in the Longshoremen's Act, legislated specifically with regard to longshoremen and harbor workers engaged in maritime employments, and found no reason for excepting a class of employees, namely railway employees engaged in interstate commerce, with regard to which it had not legislated, while in the District of Columbia Compensation Act, it had specifically included all employments in the District of Columbia. In including all employments, it obviously included railway employees engaged in interstate commerce, and was necessarily compelled, in order to carry out its intention, to insert a specific clause excepting such employees.

POINT III.

By interpreting this statute to include railway employees engaged in interstate commerce, there arises a maze of inconsistencies, contradictions and confusion in their rights and remedies, as to clearly show an absence of intent on the part of Congress, in view of the past congressional legislation on the subject, to include this class of men.

The petitioner contended in the Circuit Court of Appeals, that if this act be held to apply to him, it must necessarily be held to apply to all railway employees who were injured while working in navigable waters, although engaged in interstate commerce. The basis for this argument was that if a man loading freight into freight cars on a railroad float is engaged in maritime employment within the meaning of the act, then a brakeman, conductor or engineer moving freight cars onto the float falls in the same category. And to go even further, if the mere fact that petitioner was injured while working in navigable waters removes him from the provisions of the Federal Employers' Liability Act, then it would operate with like effect upon other classes of railway employees engaged in interstate commerce. In regard to this contention, the Court states the following (R. 61):

> "Moreover, it does not follow that the mere *locus* of the accident necessarily determines the right. A brakeman coupling cars upon a float, or an engineer driving his engine on a float bridge may not be in maritime service just because he is over the water at the moment. See *Cope* v. *Vallette Dry Dock Co.*, 16 Fed. 924, 925 (C. C.

> La.), aff'd 119 U. S. 625, 7 S. Ct. 336, 30 L. Ed. 501. We do not say that he is not. We merely pass that problem until it shall arise."

We do not think this statement is correct. This Court has repeatedly expressed the rule in this regard, and in *Great Lakes Dredge & Dock Co.* v. *Kierejewski*, 261 U. S. 479, repeated it again, page 480:

> "'The general doctrine that, in contract matters, admiralty jurisdiction depends upon the nature of the transaction and, in tort matters, upon the locality, has been so frequently asserted by this Court that it must now be treated as settled.' *Grant Smith-Porter Ship Co.* v. *Rohde*, 257 U. S. 469, 476, 66 L. Ed. 321, 324, 25 A. L. R. 1008, 42 Sup. Ct. Rep. 157."

Cope v. *Vallette Dry Dock Co.* involved a question in an action to recover for salvaging a dry dock, and the Court held that the action was not within the admiralty jurisdiction. An action of that kind is more in the nature of a quasi contract and not one in tort. It must therefore be assumed that a brakeman, conductor, locomotive engineer or any other railway employee who happens to be injured while working on a float, is in no different position than the petitioner in this case. The application of the Longshoremen's Statute to this class of employees in effect amounts not only to a deprivation of their right of action under the Federal Employers' Liability Act, but of their right of action under the Safety Appliance Act (45 U. S. C. A. Secs. 1-21) and Boiler Inspection Act (45 U. S. C. A. Secs. 22-34).

If any of these employees, while on a float, is injured through the failure of couplers on freight cars to couple

automatically on impact, he would be entitled to recover for his damages, providing, of course, the Safety Appliance violation was the proximate cause of the accident. (Section 2, Safety Appliance Act; *Chicago, Great Western Rd. Co.* v. *Schendel*, 267 U. S. 287.)

According to the holding, however, of the Circuit Court of Appeals, the fact that he was injured while on navigable waters would necessarily bring him within the provisions of the Longshoremen's Compensation Act. Likewise, if any of these employees was injured while on the float due to the violation of the Boiler Inspection Act, he would, prior to the passage of the Longshoremen's Act, be entitled to recover for his damages under that statute. *Baltimore & Ohio Ry. Co.* v. *Groeger*, 266 U. S. 521; *Great Northern Ry. Co.* v. *Donaldson*, 246 U. S. 121. This statute would, in effect, also be supplanted.

A pertinent question, therefore, is this: Did Congress intend by this Longshoremen's Statute, to supplant without any mention of the fact, the Safety Appliance Act, which has been on the statute books since 1893, and the Boiler Inspection Act? Did it intend to legislate with regard to brakemen, locomotive engineers or conductors employed by common carriers in interstate employment? Did it intend to deprive these employees of rights under the railroad statutes, merely because they happened to be on a float in navigable waters?

It may be contended that the Act was not intended to apply to this class of employees, but only to freight handlers. Then let us assume that a freight handler is told by his superior to adjust the couplers between two cars on a float, and while doing so, is injured. Would not the freight handler be in the same position as the brakeman, and entitled to the remedies afforded by the

Safety Appliance Act, or is this statute only to be applied to freight handlers while engaged in handling freight, and not while engaged in any other kind of work?

Furthermore, if it was intended to apply to freight handlers only, then is not the loading of freight cars on to a float similar to loading freight into the freight cars, and would not a brakeman injured while moving cars on to a float, be entitled to pursue his remedy under the Federal Employers' Liability Act? Is it reasonable to suppose that Congress intended to so deflect the course of legislation with regard to these railway employees, as to create a situation such as the one we have here? We do not think so.

The holding of the Circuit Court of Appeals, if pursued to its logical conclusion, would give this statute a far-fetched interpretation, and when we bear in mind the history of legislation covering railway employees, the conclusion becomes irresistible that Congress never intended by this statute, without giving any inkling of an intention to so legislate, to brush aside the statutes affecting railway employees engaged in interstate commerce, and railway employees of interstate common carriers generally, which were enacted during the last thirty-five years.

These statutes, when passed, had the support of various organizations of railway employees, were favored by them, and their passage was urged vigorously in their behalf. Congress never intended to amend in any respect, this well-defined legislation regarding railway employees, without as much as mentioning the word "railway".

Of course, to give effect to the statute in question, so as to include the plaintiff in this case, would be tanta-

mount to a repeal of the Federal Employers' Liability Act, so far as it is applicable to freight handlers engaged in interstate commerce, and it is a well known principle of law, that the courts do not favor repeals of statutes by implication.

McCool v. *Smith*, 66 U. S. 419;
United States v. *Greathouse*, 166 U. S. 601;
Cope v. *Cope*, 137 U. S. 682.

In the words of the decision in *Cope* v. *Cope*, *supra* (p. 686):

> "Nothing is better settled than that repeals, and the same may be said of annulments, by implication, are not favored by the courts, and that no statute will be construed as repealing a prior one, unless so clearly repugnant thereto as to admit of no other reasonable construction. *McCool* v. *Smith*, 66 U. S. Black 459 (17:218); *Bowen* v. *Lease*, 5 Hill, 221; *Ex parte Yerger*, 75 U. S. 8 Wall. 85, 105 (19:332, 339); *Furman* v. *Nichol*, 75 U. S. 8 Wall. 44 (19:370); *United States* v. *Sixty-seven Packages*, 58 U. S. 17 How. 85 (15:54); *Red Rock* v. *Henry*, 106 U. S. 596 (27:251)."

Similar utterances are contained in *United States* v. *Greathouse*, *supra* (p. 605):

> "But repeals by implication are not favored, and when two statutes cover in whole or in part the same matter, and are not absolutely irreconcilable, effect should be given, if possible, to both of them. *Frost* v. *Wenie*, 157 U. S. 46, 58 (39:614, 619); *United States* v. *Healy*, 160 U. S. 136, 147 (40:369, 373)."

McCool v. *Smith, supra,* expresses the same doctrine (p. 470):

> "'A repeal by implication is not favored.' 'The leaning of the courts is against the doctrine, if it be * * * possible to reconcile the two Acts of the Legislature together.' Sedg. Stat. and Cons. Law, 127; *Canal Co.* v. *R. R. Co.,* 4 Gill & J., 1; *Bowen* v. *Lease,* 5 Hill, 221; *Williams* v. *Potter,* 2 Barb., 316."

Especially is this principle applicable when by a series of legislative enactments and decisions of the courts creating definite rights and liabilities for railway employees, their status is so definitely fixed and established.

SOL GELB,
Counsel for Petitioner.

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Supreme Court of the United States

October Term, 1929

No. 248

VICTORIO NOGUEIRA,

Petitioner,

against

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY.

BRIEF ON BEHALF OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

JOHN M. GIBBONS,
Counsel for Respondent.

EDWARD R. BRUMLEY,
EDMUND J. MOORE,
Of Counsel.

E. W. TRAVER, Law Printer, 154 Nassau St., N. Y. (Tel. Beekman 2726)

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Supreme Court of the United States

October Term, 1929

VICTORIO NOGUEIRA, *Petitioner,* against THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY.	No. 248.

BRIEF ON BEHALF OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions of the Courts Below

The Trial Court, United States District Court for the Southern District of New York, said:

> "This injury arose upon a boat on navigable waters, a boat of more than 18 tonnage. The Compensation Act passed by Congress provides compensation for disability or death, and in view of the nature of this Compensation Act, I am thoroughly convinced that this Court has no jurisdiction, and that this man's remedy is one of application under the compensation act. Therefore the motion to dismiss is granted" (R., 66, 68).

The Circuit Court of Appeals, Second Circuit, affirmed the judgment, Circuit Judge Swan writing the opinion (32 Fed. (2d) 179).

Jurisdiction of This Court

(a) The jurisdiction of this Court is sought to be invoked under Section 240 of the Judicial Code, as amended, Subdivision (a) (43 Stat. 938).

(b) The judgment sought to be reviewed is dated July 17th, 1928 (R., 13). The present petition was filed in this Court on the 15th day of July, 1929.

(c) This case was tried before the Honorable Walter C. Lindley and a jury in the United States District Court for the Southern District of New York, on July 11th, 1928. The action was brought under the Federal Employers' Liability Act (Act of April 22, 1908, c. 149, § 1, 35 Stat. 65), to recover damages for personal injuries received by plaintiff while in the employ of The New York, New Haven and Hartford Railroad Company as a laborer and freight handler at Pier 42, East River, New York City, on October 13th, 1927 (R., 3-6).

The Trial Court held that the injury arose upon a boat on navigable waters, a boat of more than 18 tonnage, that the Compensation Act applied, that the Court had no jurisdiction, and granted the motion to dismiss (R., 66, 68, 69).

In the lower Courts petitioner contended that the Longshoremen's & Harbor Workers' Compensation Act (Act of March 4, 1927, c. 509, § 1, 44 Stat. 1424) had no application to the case; that it was never intended to have any application to one in petitioner's position; that the meaning of the Statute is distorted by any such interpretation; that it was never the intent of Congress to make the Statute ap-

plicable to railway employees engaged in interstate commerce; that the wording of the Statute is not sufficiently broad to include interstate railway employees; that the term "maritime employment" was not intended to cover those employees engaged in an adjunct to transportation by rail (R., 19, 20, 44-54, 65-67, 68, 69; petition for writ of certiorari, p. 4).

The complaint was dismissed at the end of the plaintiff's case, and judgment was rendered in favor of the defendant (R., 13).

Statement of the Case

Petitioner brought this action to recover for injuries alleged to have been received by him on October 13th, 1927, while in respondent's employ as a laborer and freight handler (R., 3). At Pier 42 he put a bale of paper on a truck and started to truck the bale down a plank running from the dock to the float (R., 28, 30-32). When he got down on the float the handtruck and bale went over his leg (R., 43). The accident happened on navigable waters, in the East River (R., 66). The float weighed over 500 pounds (R., 65, 66).

On the appeal to the United States Circuit Court of Appeals for the Second Circuit, respondent argued that the Longshoremen's & Harbor Workers' Compensation Act of March the 4th, 1927, was exclusive and controlled the case at bar. Respondent contended that its interpretation would distribute compensation regardless of fault, according to the plain terms of the statute, resulting in no absurdity or injustice, promoting uniformity.

Question Presented

Whether the Federal Employers' Liability Act of 1908, as amended, or whether the Longshoremen's & Harbor Workers' Compensation Act of 1927, applies to employees of railroads, when both are engaged in interstate commerce, when such employees are injured on navigable waters, while doing the work of longshoremen.

Argument

The petition for writ of certiorari should be granted:

(1) The Circuit Court of Appeals for the Second Circuit has decided an important question of Federal law which has not been, but should be, settled by this Court.

(2) There is the need of a final decision in respect of the field of rights and remedies of railroad employees, engaged in interstate commerce, but doing longshore work, on navigable waters.

(3) To obtain this final decision is obviously important for injured employees, the United States Employees' Compensation Commission, and the railroads.

(4) A decision by this Court, at this time, will avoid conflicting decisions by other Circuit Courts of Appeals on the same matter.

(5) The number of decisions of this Court relating to longshoremen, stevedores, seamen, indicates a willingness to clarify a situation essentially confusing.

While the respondent considers its position correct, and the opinion of the Circuit Court of Appeals unanswerable, it joins in the petition for a writ of certiorari for the reasons given.

The Federal Employers' Liability Act of 1908 probably covered certain stevedores of railroads. See *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205, 213. Between 1908 and 1920 attempts were made to apply state compensation laws to stevedores. We first have the decision of this Court in *Southern Pacific Co.* v. *Jensen, supra,* interpreting the Judiciary Act of 1789, § 9, 1 Stat. 73, 77. Then in October, 1917, Congress passed a law expressly saving to claimants rights and remedies under state workmen's compensation laws (Act of October 6, 1917, c. 97, 40 Stat. 395), declared unconstitutional in *Knickerbocker Ice Co.* v. *Stewart,* 253 U. S. 149. By the so-called Jones Act (Act of March 4, 1915, § 20, c. 153, 38 Stat. 1185, as amended by § 33 of Act of June 5, 1920, c. 250, 41 Stat. 1007), seamen, including stevedores, came under the provisions of the Federal Employers' Liability Act. This Court has treated the subject matter in several cases, among others:

Industrial Comm. v. *Nordenholt Corp.,* 259 U. S. 263; *Panama Railroad Co.* v. *Johnson,* 264 U. S. 375; *Engel* v. *Davenport,* 271 U. S. 33; *Internat. Stevedore Co.* v. *Haverty,* 272 U. S. 50; *Pacific S. S. Co.* v. *Peterson,* 278 U. S. 130; *Plamals* v. *"Pinar Del Rio," etc.,* 277 U. S. 151; *Buzynski* v. *Luckenbach S. S. Co.,* 227 U. S. 226; *Northern Coal & Dock Co.* v. *Strand,* 278 U. S. 142; *London Guarantee & Accident Co.* v. *Industrial Accident Commission,* 279 U. S. 109; *Baltimore Steamship Co.* v. *Phillips,* 274 U. S. 316.

On June 10th, 1922, Congress passed an amendment to §§ 24 and 256 of the Judicial Code (Act of Congress of June 10, 1922, c. 216, 42 Stat. 634), declared unconstitutional in *Washington* v. *Dawson & Co.*, 264 U. S. 219. This was the third attempt to place stevedores under the state workmen's compensation laws.

We now come to the Longshoremen's & Harbor Workers' Compensation Act of March 4th, 1927, *supra,* which affords longshoremen Federal compensation. This Act made a broad classification with express exclusion of master and members of crew, and vessels under 18 tons, but did not exclude railroad employees. The Act of May 17th, 1928, c. 612, 45 Stat. —, relating to the District of Columbia, expressly excludes employees of common carriers of railroad when engaged in interstate or foreign commerce.

The Longshoremen's & Harbor Workers' Compensation Act has been considered in the following cases, but the decisions do not affect the present question:

Chernik v. *Clyde Steamship Co.*, 248 N. Y. 508, petition for writ of certiorari denied in 278 U. S. 637; *Perry* v. *United States Employees' Compensation Commission,* 27 Fed. (2d) 144; *F. Jarka Co.* v. *Monahan,* 29 Fed. (2d) 741; *Obrecht-Lynch Corp. et al.* v. *Clark,* 30 Fed. (2d) 144; *The Pacific Pine,* 31 Fed. (2d) 152; *Howard* v. *Monahan,* 31 Fed. (2d) 480; *Texas Employees' Ins. Ass'n* v. *Sheppard,* 32 Fed. (2d) 300; *Merchants' & Miners' Transp. Co.* v. *Norton,* 32 Fed. (2d) 513; *Wellgeng* v. *Marshall,* 32 Fed. (2d) 922; *Benson* v. *Crowell,* 33 Fed. (2d) 137; *Joyce* v. *U. S. Deputy Comm.,* 33 Fed. (2d) 218; *Pocahontas Fuel Co., Inc., et al.* v. *Monahan,* August 3, 1929, reported in U. S. Daily, August 15, 1929, page 8, District Court for the District of Maine.

It is obvious that the Longshoremen's & Harbor Workers' Compensation Act has become a frequent source of litigation and a decision by this Court, at this time, will avoid possible conflicting decisions by Circuit Courts of Appeals.

Conclusion

We respectfully submit that the present petition should be granted.

JOHN M. GIBBONS,
Counsel for The New York, New Haven and Hartford Railroad Company.

EDWARD R. BRUMLEY,
EDMUND J. MOORE,
Of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1929

No. 248

VICTORIO NOGUEIRA,

Petitioner,

against

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY.

BRIEF ON BEHALF OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY

JOHN M. GIBBONS,
Counsel for Respondent.

EDWARD R. BRUMLEY,
FLEMING JAMES, JR.,
EDMUND J. MOORE,
Of Counsel.

E. W. TRAVER, Law Printer, 154 Nassau St., N. Y. (Tel. Beekman 2726)

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Supreme Court of the United States

OCTOBER TERM, 1929

VICTORIO NOGUEIRA,
Petitioner,

against

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY.

No. 248

BRIEF ON BEHALF OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY

Opinion of the Court Below

The Trial Court, United States District Court for the Southern District of New York, dismissed petitioner's complaint, rendered no reported opinion, but said at the end of the trial:

> "This injury arose upon a boat on navigable waters, a boat of more than 18 tonnage. The Compensation Act passed by Congress provides compensation for disability or death, and in view of the nature of this Compensation Act, I am thoroughly convinced that this Court has no jurisdiction, and that this man's remedy is one of application under the compensation act. Therefore the motion to dismiss is granted" (R. 52, 54).

The Circuit Court of Appeals, Second Circuit, unanimously affirmed the judgment, Circuit Judge Swan writing the opinion. 32 Fed. (2d) 179 (R. 55-61).

Jurisdiction of this Court

This Court granted petitioner's application for writ of certiorari on October 21st, 1929 (R. 62).

Statement of the Case

Petitioner brought this action to recover for personal injuries alleged to have been received by him on October 13th, 1927, while in the employ of the railroad company as a laborer and freight handler (R. 1-4). On that day he started to work at 8 o'clock in the morning at Piers 37 and 38, storing freight on railroad cars (R. 16, 17). During the three years he had worked for the company he had been along the East River, sometimes on a float, sometimes on a dock (R. 17). In the afternoon the gang of seven men and foreman went to Pier 42 (R. 18), where they were to load freight from the pier to a float. The freight consisted of bales of paper fifteen to twenty feet from the plank going from the pier to the float (R. 19). The bales were five to six feet long, and weighed about thirteen hundred pounds (R. 19).

The plank was about five and a half feet wide and twelve feet long (R. 20). This plank did not go into a car on the float, but went to the middle of the float (R. 33). The end on the float was about four or five feet lower than the end on the dock as the tide was low (R. 21). Two men put a bale of paper on a truck which had two wheels and two handles (R. 21).

After the men put the bale on the truck petitioner took the truck to the plank, and there stopped (R. 22, 23). Some of the men stuck their hooks into the bale of paper, and petitioner and another man lifted up the handles of the truck (R. 23). Some pushed the truck down, and then lifted up the hooks. The truck came very slow at first, but started to go fast (R. 24). He was still holding on to the handles when the truck got down on the float (R. 24, 25), although the handles went up after he had gone three or four feet (R. 25). The other workers remained on the plank alongside of the dock (R. 25). When he got to the float the truck and bale fell on his leg (R. 26). When petitioner fell he was on the floor of the float, falling on top of the rail (R. 33). He was still holding on to the handles when the truck got down, and he did not fall down until he got to the float (R. 24, 33).

The float itself weighed five hundred tons (R. 51). It was conceded the float was on navigable waters (R. 52). The bale involved in the accident was in the course of transportation from New York to Connecticut (R. 13).

Petitioner brought this action under the Federal Employers' Liability Act (Act of Congress, April 22, 1908, c. 149, §1, 35 Stat. 65; R. 2). The complaint was dismissed for lack of jurisdiction on the ground that petitioner's remedy was under the Longshoremen's and Harbor Workers' Compensation Act (R. 52; Act of Congress, March 4, 1927, 44 Stat. 1424). The Circuit Court of Appeals concluded that railway employees, employed in maritime employment, could not be excepted from the Act, and affirmed the judgment (R. 61, 62); 32 Fed. (2d) 179, 182.

Question Presented

Whether the Federal Employers' Liability Act of 1908, as amended, or the Longshoremen's and Harbor Workers' Compensation Act applies to employees of railroads, when both employers and employees are engaged in interstate commerce, when such employees are injured on navigable waters, while doing the work of longshoremen (R. 53, 54).

Summary of Argument

Point I—The statute involved is clear and unambiguous, and petitioner comes under its provisions.

(a) Pertinent provisions of the statute.

(b) The employment was maritime.

(c) The injury occurred upon navigable waters.

(d) The case is within admiralty jurisdiction in tort.

(e) This case is not of local but of general admiralty concern.

(f) Recovery cannot validly be provided by state compensation law.

(g) The statute is exclusive.

Point II—The intention of Congress was to provide compensation for railroad employees doing longshore work, injured on navigable waters, whether or not they were engaged in interstate commerce.

(a) Previous attempts by Congress to provide com-

pensation for longshoremen had been declared unconstitutional.

(b) Rights and remedies of seamen, longshoremen, and railroad employees prior to passage of Longshoremen's and Harbor Workers' Compensation Act.

(c) Legislative history of the passage of the Act.

(d) Act of May 17, 1928, applying to District of Columbia.

Point III—The interpretation adopted promotes uniformity and provides for all classes.

POINT I

The statute involved is clear and unambiguous, and petitioner comes under its provisions.

As was said by Mr. Justice Holmes, writing the opinion of this Court, in connection with another statute, "We are of opinion that the language of the statute is too definite to be escaped by construction" (*The Coamo,* 267 U. S. 220). It is a fundamental canon of statutory construction that Congress must be presumed to have intended the plain meaning of the language used in a statute.

(a) *Pertinent provisions of the Longshoremen's and Harbor Workers' Compensation Act, Act of March 4, 1927, c. 509, 44 Stat. 1424.*

An Act to provide compensation for disability or death resulting from injury to employees in certain maritime employments, and for other purposes.

§2(2) reads as follows:

> The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

§2(3) reads as follows:

> The term "employee" does not include a master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

§2(4) reads as follows:

> The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry dock).

§3 reads in part as follows:

> (a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. No compensation shall be payable in respect of the disability or death of—
>
> (1) A master or member of a crew of any vessel, nor any person engaged by the master to load or un-

load or repair any small vessel under eighteen tons net; or * * *

§4 reads as follows:

Liability for compensation. (a) Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 7, 8, and 9. In the case of an employer who is a subcontractor, the contractor shall be liable for and shall secure the payment of such compensation to employees of the subcontractor unless the subcontractor has secured such payment.

(b) Compensation shall be payable irrespective of fault as a cause for the injury.

§5 reads as follows:

Exclusiveness of liability. The liability of an employer prescribed in §4 shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee.

For the sake of brevity we shall in most instances refer to the Longshoremen's and Harbor Workers' Compensation Act as the Act. In Appendix A we have set out this Act at greater length.

(b) *The employment was maritime.*

The petitioner contends that the Act does not apply to him because his employment was in interstate commerce, was an adjunct to transportation by rail, and, therefore, was not maritime employment within the meaning of the Act (petitioner's brief, pp. 6-8). This contention is quite separate and distinct from the claim that the Act was never intended to include railroad employees at all. We agree that the Act includes only those engaged in maritime work, by reason both of its title and of the provisions of Sections 2(4) and 3(a). But we cannot agree that the petitioner was not engaged in maritime employment merely because of the fact that the work was an adjunct to interstate transportation by rail. Some employees of a railroad, working on a float, may not be in maritime employment. The determination of the status of other classes of employees is not necessary to the decision of this case, and the problem was expressly passed by the Circuit Court of Appeals (R. 61; see our brief p. 26). The quotation set out on page 7 of petitioner's brief, from *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, 213, could have, of course, no reference to the Act here involved. By express language it is exclusive of all other actions "at law or in admiralty" (§5). Furthermore, it is quite conceivable that some railroad employees on "boats" would not come under the Act because not longshoremen or harbor workers, and so not within the title. Because prior to the Act, or, at any rate, prior to

the Merchant Marine Act (Act of Congress of June 5, 1920, c. 250, §33, 41 Stat. 1007, amending Act of Congress of March 4, 1915, c. 153, §20, 38 Stat. 1185), petitioner could have sued under the Federal Employers' Liability Act (*supra*), does not signify he does not come under a later statute, broad in scope, and does not call for an arbitrary limitation of the meaning of the words longshoreman, harbor worker, maritime employment. The fact that the injury would formerly have fallen under the Federal Employers' Liability Act cannot have any effect in determining whether the character of the work was maritime. Nor can the interstate character of employment govern, unless it be conceded that petitioner's task would have been maritime had the cargo been intrastate.

Petitioner's contention must, therefore, rest upon the proposition that work having a direct and substantial connection with railroad operation cannot be maritime. But what basis is there for such a proposition? The floatmen and captains of tugs are engaged no less than the petitioner in work which is an adjunct to interstate transportation by rail. The entire operation may be thus characterized. Yet it could hardly be said that because of that fact floatmen and captains were not engaged in maritime employment. If some men engaged in the operation are unquestionably doing maritime work, it follows that a feature common to the whole operation—the feature of interstate transportation by rail—cannot be used to determine the maritime or non-maritime status of any men engaged in that operation.

Petitioner can find no support for his interpretation either in definition or judicial history. His was a specialized

service devolving upon a class clearly identified with maritime matters. *Atlantic Transport Co.* v. *Imbrovek,* 234 U. S. 52, 62. For the three years he had worked for the Company he had been along the East River, sometimes on a float, sometimes on a dock (R. 17). Even after his injury he sought and obtained employment from the Munson Line (R. 29). The employer happened to be a railroad company but his own work was clearly identified with maritime matters as a longshoreman, exactly the same as other longshoremen working for steamship or stevedoring companies. In short, petitioner's employment was maritime. His work was both upon the land and the water. *Northern Coal & Dock Co.* v. *Strand,* 278 U. S. 142, 144. It is maritime whether the employee is loading or unloading a boat. *Atlantic Transport Co.* v. *Imbrovek, supra* (pp. 61, 62).

Petitioner says the Act does not apply to railroad employees because, where the employer has failed to secure payment of compensation the defenses of fellow-servant negligence and assumption of risk are taken away, and this would take away something from railroads not available to them, and give nothing to the employees (petitioner's brief, p. 9). Petitioner then concludes the Act applies to that class of maritime employees who merely had a right of action at common law (petitioner's brief, p. 10). He has forgotten the Merchant Marine Act and *International Stevedoring Co.* v. *Haverty,* 272 U. S. 50. Both longshoremen of railroads and longshoremen of steamboat companies had other rights and remedies—Federal Employers' Liability Act and the Merchant Marine Act incorporating the former into the general maritime law.

We think there can be no possible weight to the conten-

tion made by petitioner that because there is no direct reference to interstate railroad employees the Act does not cover them. It does not purport to name employees.

We do not think the courts should limit arbitrarily the operation of a remedial statute, broad in scope, intended by its proponents to substitute a more modern and socially desirable remedy than that provided by any so-called liability act.

(c) *The injury occurred upon navigable waters.*

When the truck was on the float petitioner still held the handles (R. 24). He fell on top of the rail when he was on the floor of the float and the truck and bale fell upon his leg (R. 26, 33).

The place where the negligent act "takes effect injuriously" governs jurisdiction in tort cases. "The negligence, of itself, furnishes no cause of action; it is *damnum absque injuria.*" *The Plymouth,* 3 Wall. 20, 36. This is further illustrated by *Atlee* v. *Packet Co.,* 21 Wall. 389; *Johnson* v. *Chicago & P. Elev. Co.,* 119 U. S. 388; *Martin* v. *West,* 222 U. S. 191; *Smith & Son* v. *Taylor,* 276 U. S. 179.

In *Hermann* v. *Port Blakely Mill Co.,* 69 Fed. 646 (cited in *Atlantic Transport Co.* v. *Imbrovek, supra,* p. 60) a laborer working in the hold of a vessel was injured by a piece of lumber sent, without warning, down through a chute by a person working on the pier. It was held the case was one of admiralty jurisdiction, although the negligent acts were completed on the land, because the substance and consummation of the tort were on the water. The locus

of the damage provides the real test. *A fortiori* this continues true where the negligence occurs partly on land and partly on water.

In the case at bar there was no impact until the bale, truck, and petitioner were on navigable waters. His fall over the rail was on navigable waters. The cause of action —or fact basis of the right of action—was not complete until he was on the float.

The Mary Garrett, 63 Fed. 1009, presents the reverse situation of our case. *The Aurora,* 163 Fed. 633, 178 Fed. 587, affirmed under the name of *Aurora Shipping Co.* v. *Boyce,* 191 Fed. 960 (C. C. A. 9th) is analogous in many respects and the Court looked at the place of injury.

There is another line of cases in which apparently there is less unanimity of result, those in which a man slips or falls from the ship to the wharf, or vice versa. Some of them decide that the locus of the impact determines jurisdiction. *The Aurora, supra.* Others proceed on the theory that a cause of action is complete when the injured man is falling even before the impact and that since at that time he has not yet reached the other element, the place from which he fell governs the question of jurisdiction. *The Strabo,* 90 Fed. 110, aff'd 98 Fed. 998 (C. C. A. 2d). If the petitioner in the instant case suffered any damage while on the gang-plank, it is submitted that it was shown to be only nominal and that the case of *The Strabo* would not govern. Moreover, this is not a case where the injuries resulted from the fall but rather where the petitioner was struck by something falling upon him from the land.

In cases like the present, the simplest test of jurisdiction in the tort aspect is the locus of the impact. The efficient administration of the Longshoremen's and Harbor Workers' Compensation Act requires that the test be a simple one. To go further back in the chain of causation of an injury would involve those seeking the beneficial remedies of the Act and those administering it in the subtleties and complexities of the law of proximate cause. This would, it is submitted, be an undesirable result.

(d) *The case is within admiralty jurisdiction in tort.*

> "If the cause of action arose upon the river, the rights of the parties are controlled by maritime law, the case is within the admiralty and maritime jurisdiction, and the application of the Louisiana Compensation Law violated §2 of Art. 3." *Smith & Son* v. *Taylor, supra,* p. 181.

(e) *This case is not of local but of general admiralty concern.*

By reason of the fact that petitioner's employment was maritime, that the injury occurred upon navigable waters, that the case is within the admiralty jurisdiction in tort, it becomes one not of local but of general admiralty concern, involving all of the characteristic features of the general maritime law. *London Guarantee & A. Co.* v. *Industrial Acci. Com.*, 279 U. S. 109. It has a special, direct relation to commerce. *Gt. Lakes Co.* v. *Kierejewski*, 261 U. S. 479; *Washington* v. *Dawson & Co.*, 264 U. S. 219; *Gonsalves* v. *Morse Dry Dock Co.*, 266 U. S. 171; *Robins Dry Dock Co.* v. *Dahl*, 266 U. S. 449, 457.

(f) *Recovery cannot validly be provided by state compensation law.*

Under the Act compensation is not payable if recovery for the disability or death through workmen's compensation proceedings may validly be provided by state law (§3, subdivision [a]). Longshore work is not of "mere local concern" but has a "special relation to commerce and navigation" and is beyond "the regulatory power of the State." *Northern Coal & Dock Co.* v. *Strand, supra.* The distinction is made clear in *Grant Smith-Porter Co.* v. *Rohde,* 257 U. S. 469, where the contract was non-maritime; in *Industrial Comm.* v. *Nordenholt Co.,* 259 U. S. 263, where the tort was committed on the dock; in *Millers' Underwriters* v. *Braud,* 270 U. S. 59, where the employment was non-maritime and of local concern; and in *London Guarantee & A. Co.* v. *Industrial Acci. Com., supra,* where the maritime jurisdiction was held to be exclusive.

(g) *The statute is exclusive.*

Sec. 5 of the Act provides that the liability of an employer for compensation "shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, * * *." Certainly this provision takes away the longshoreman's right under the Merchant Marine Act which incorporates the Federal Employers' Liability Act into the maritime law. No reason appears why it does not and should not also directly take away a railroad longshoreman's right under the Federal Employers' Liability Act, if the conditions are satisfied. Petitioner apparently admits this (petitioner's brief, bot. of p. 8 and top of p. 9). Senate Report No. 973 in connection with

Senate Bill No. 3170, and House Report No. 1767 in connection with Senate Bill No. 3170 bear out our interpretation (Cong. Rec., 69th Cong., 1st Sess., vol. 67, pt. 10, pp. 10,467, 10,608-10,614; 69th Cong., 2nd Sess., vol. 68, pt. 2, p. 1687). These reports will be discussed under Point II (c).

While the Act makes no express reference to the title of any existing law or statute, "at law" and "all other liability" can refer, in respect of all longshoremen injured upon navigable waters, only to the Merchant Marine Act, the Federal Employers' Liability Act, the Federal Safety Appliance Acts (Act of March 2, 1893, c. 196; 27 Stat. 531: amendatory Act of March 2, 1903, c. 976; 32 Stat. 943: supplementary Act of April 14, 1910, c. 160; 36 Stat. 298), and the Federal Locomotive Boiler Inspection Act (Act of February 17, 1911, c. 103; 36 Stat. 913, as amended March 4, 1915, c. 169; 38 Stat. 1192, and June 7, 1924, c. 355; 43 Stat. 659). They are adequately identified, adopted by generic reference. *Panama R. R. Co.* v. *Johnson,* 264 U. S. 375, 391, 392. The broad scope of its terms necessarily produces a repeal of anything in conflict without naming it. An examination of the existing applicable laws shows the limited repeal in fact effected.

The facts of the case bring it squarely within the provisions of the Act—the float was a vessel of more than 18 tons, petitioner was not a master nor a member of the crew, the employment was maritime, the injury occurred upon navigable waters, the case is within admiralty jurisdiction in tort, the case is not of local but of general admiralty concern, recovery cannot validly be provided by state compensation law, the statute is exclusive, and clear and unambiguous.

POINT II

The intention of Congress was to provide compensation for railroad employees doing longshore work, injured on navigable waters, whether or not they were engaged in interstate commerce.

(a) *Previous attempts by Congress to provide compensation for longshoremen had been declared unconstitutional.*

It is now a matter of common knowledge how the suggestion thrown out in *Washington* v. *Dawson & Co., supra,* p. 227, came to be eagerly adopted by Congress. *Southern Pacific Co.* v. *Jensen, supra,* held that state compensation laws applying to stevedores interfered with the uniformity of the maritime law, and an award under a compensation law, not being a common law remedy, was not excepted from the grant of admiralty jurisdiction provided by the Judiciary Act of 1789, c. 20, §9; 1 Stat. 76.

Knickerbocker Ice Co. v. *Stewart,* 253 U. S. 149, dealt with an amendment to the saving clause that added "and to claimants the rights and remedies under the Workmen's Compensation law of any state." Act of Congress of October 6, 1917, c. 97, 40 Stat. 395.

Washington v. *Dawson & Co., supra,* declared unconstitutional, on the authority of the two previous cases, another attempt of Congress to pass a compensation law which restricted the power to claim compensation under state laws to "persons other than the master or members of the crew of a vessel." Act of Congress, June 10, 1922, c. 216, 42 Stat. 634, amending §§24 and 256 of the Judicial Code.

(b) *Rights and remedies of seamen, longshoremen, and railroad employees prior to passage of Longshoremen's and Harbor Workers' Compensation Act.*

Immediately prior to the passage of the Longshoremen's and Harbor Workers' Compensation Act the situation was by no means simple. Congress, in 1908, had passed the Federal Employers' Liability Act, and Mr. Justice McReynolds, writing the opinion of this Court in *Southern Pacific Co.* v. *Jensen, supra,* said that the word "boats" in the Federal Employers' Liability Act referred to vessels which might be properly regarded as in substance but part of a railroad's extension or equipment as understood and applied in common practice (p. 213).

Petitioner assumes that heretofore he would have had a right to maintain an action under the Federal Employers' Liability Act (brief, pp. 4, 8), that all railroad employees engaged in interstate commerce injured on a float were governed by the Federal Employers' Liability Act, the Safety Appliance Act, the Boiler Inspection Act (pp. 19-21). The opinion of Circuit Judge Swan assumes this in part (R. 56). Probably certain further qualifications have to be made to this assumption. Petitioner cites certain cases in support thereof. *B. & O. S. W. R. R.* v. *Burtch,* 263 U. S. 540, involved unloading interstate freight from a train. The work was held to be a part of interstate commerce. The same holding was made in *Illinois Cent. R. Co.* v. *Porter,* 207 Fed. 311 (C. C. A. 6th, 1913), where the decedent was loading interstate freight from a warehouse into a car. In *Erie R. Co.* v. *Jacobus,* 221 Fed. 335 (C. C. A. 3rd, 1915), plaintiff, a deckhand on one of defendant's tugs, was injured while in the act of securing a line to a

bitt, the tug starting without warning. The question of interstate commerce was properly left to the jury. "The expression 'by railroad' is but descriptive of the kind of common carriers to which the statute relates * * *" (p. 338). Because the act (Federal Employers' Liability Act) enumerates boats and wharves, "the scope of the act was intended to include the liability of carriers * * * occurring upon or in connection with those instrumentalities while engaged in interstate commerce" (p. 338).

We must remember the Merchant Marine Act of 1920. But whatever rights and remedies existed prior to the Act involved we must concern ourselves with its effect and cannot insist upon the continuance of a right solely for historical reasons.

Cases of this kind, even prior to the Act, looked toward admiralty as shown by *The Passaic,* 204 Fed. 266 (C. C. A. 2nd, 1913), which applied the limited liability acts while also applying the Federal Employers' Liability Act (cited by petitioner at p. 8).

The Merchant Marine Act gave to seamen the remedies accorded to railroad employees under the Federal Employers' Liability Act, incorporating it into the maritime law of the United States. *Engel* v. *Davenport,* 271 U. S. 33. The Merchant Marine Act covered stevedores, who were classified as seamen. *International Stevedoring Co.* v. *Haverty, supra.*

Seamen, including stevedores, could sue in federal or state courts to enforce this last Act. *Engel* v. *Davenport, supra.* Rights could be enforced by suits in admiralty or

actions at law, but not both. *Buzynski* v. *Luckenbach S. S. Co.*, 277 U. S. 226. The Merchant Marine Act excludes state statutes. *Engel* v. *Davenport, supra.* It applies even to the case of a seaman injured on a foreign vessel. *Williams* v. *Oceanic Stevedoring Co.*, 27 Fed. (2d) 905 (S. D. Texas, 1928).

If a seaman is injured on the ship he has a right to indemnity for injuries due to unseaworthiness or defective appliances, or a right under the Merchant Marine Act, and also a right to maintenance, cure and wages. *Pacific Co.* v. *Peterson,* 278 U. S. 130. If a seaman is injured on the land he is allowed recovery for maintenance and cure. *The Montezuma,* 19 Fed. (2d) 355 (C. C. A. 2nd).

Petitioner's brief goes into this judicial and legislative history (pp. 11-14), but does not point out the significance of the Merchant Marine Act, and omits any reference to *International Stevedoring Co.* v. *Haverty, supra.*

(c) *Legislative history of the passage of the Act.*

With this introduction we come to the legislative history of the passage of the Longshoremen's and Harbor Workers' Compensation Act, assuming for the moment that the statute is not so clear it forbids construction.

On February 17th, 1926, Senate bill 3170 was referred to the Committee on the Judiciary (Cong. Rec., 69th Cong., 1st Sess., vol. 67, pt. 4, p. 4119). The subcommittee held hearings on March 16 and April 2, 1926. Various representatives of longshoremen appeared urging passage of a compensation law. The committee report (No. 973) says there are in the neighborhood of three hundred thousand

men employed in longshore work in the entire country, deems it unnecessary to comment upon the modern change in the relation between employers and employees by systems of compensation as distinguished from liability.

On April 8th, 15th and 22nd, 1926, hearings were held before the Committee on the Judiciary of the House in connection with H. R. 9498. This bill, as well as the original Senate bill, contained an express provision that the act did not apply to employment as master or member of the crew of a vessel (Sec. 3) (Hearings before the Committee on the Judiciary, House of Representatives, 69th Cong., 1st Sess., p. 2. Hearings before a subcommittee of the Committee on the Judiciary, United States Senate, 69th Cong., 1st Sess., p. 2).

On June 2nd, 1926, Senate bill 3170 was submitted with report No. 973 and on June 3rd the Senate considered it. The bill still excluded "master" and "seaman" (Cong. Rec., 69th Cong., 1st Sess., vol. 67, pt. 10, p. 10,608). On January 14th, 1927, the bill was referred to the Committee of the Whole House on the State of the Union, accompanied by House Report No. 1767 (Cong. Rec., 69th Cong., 2nd Sess., vol. 68, pt. 2, p. 1687). At that time the bill included master and member of crew and gave them compensation in addition to maintenance and cure and wages.

This Report reads in part as follows:

> "The Senate bill as reported by the committee will provide the benefits of workmen's compensation to practically all maritime workers within the admiralty jurisdiction. Workmen's compensation has come to be universally recognized as a necessity in the in-

terest of social justice between employer and employee. It is the modern substitute for the old common law remedy afforded through actions at law for damages, and promptly affords relief to the injured employee by furnishing medical attendance and supplies immediately upon the occurrence of the injury * * *."

On March 2nd, 1927, the House passed the bill, and at that time it contained the provision that the term "employee" did not include a master or a member of a crew of any vessel (Cong. Rec., 69th Cong., 2nd Sess., vol. 68, pt. 5, pp. 5402-5414). On March 4th, 1927, the Vice-President laid the House amendment to Senate bill 3170 before the Senate and the Senate concurred (Cong. Rec., 69th Cong., 2nd Sess., vol. 68, pt. 5, pp. 5900-5909).

Both the original Senate and House bills expressly excluded "master or member of the crew of a vessel." Senate bill No. 3170, submitted with House Report No. 1767 on January 14th, 1927, included master or member of the crew (Sec. 2(3)). It gave them compensation in addition to maintenance and cure and wages (Sec. 5). When the bill was returned from the House to the Senate, seamen were excluded because they were satisfied with their condition as explained to Congress by their representatives.

If the Act is so clear that interpretation must be gathered from the words themselves, then Point II of petitioner's brief is outside of the scope of this inquiry (pp. 10-18). But we have set out the legislative history because we disagree with petitioner's findings of Congressional intent.

On page 14 of his brief petitioner argues that Congress had no intention of legislating with respect to railway employees engaged in interstate commerce because Congress had already done this under its power to regulate commerce. But petitioner forgets Congress had already legislated for longshoremen by the Merchant Marine Act. The change was from liability to compensation for this class of employees. This Court said Congress could enact a general employers' liability law, or general provisions for compensating injured employees. *Washington* v. *Dawson & Co., supra.* Congress had already done the one and had made two unsuccessful attempts at compensation legislation.

On page 16 of his brief petitioner says that seamen occupy the same position as railway employees with regard to their remedies, citing *Panama R. R. Co.* v. *Johnson, supra,* and *Engel* v. *Davenport, supra.* This is true only in part for we have shown how seamen have other rights than those conferred by the Merchant Marine Act. Also the venue may be different (see note in 41 Harvard Law Review, p. 791). Petitioner then argues that when the original intention was to include seamen, specific reference was made to them and as no specific reference was made to railway employees it was the obvious intention of Congress not to include them. The reasoning might be sounder if founded on a correct fact basis. The first bill expressly excluded seamen. This is some indication it included railway employees, certainly true if we adopt petitioner's theory of interpretation. In an intermediate legislative stage they were included, expressly, to get them out of the express exclusion. In the final stage they were again expressly excluded, to get them out of the express inclusion, and at the request of their representatives.

We cannot do better than use the words of Circuit Judge Swan in this connection:

> "In the light of this legislative history it would seem impossible to construe the statute (assuming that its language is not so clear as to forbid construction) so as to exclude freight handlers who work on railway car floats, without also excluding longshoremen who work on other types of vessels. Both classes are within the letter of the statute; both had other rights and remedies before its passage" (R. 60).

(d) *Act of May 17, 1928, applying to District of Columbia.*

The Act of May 17, 1928, c. 612, 45 Stat. 600, applies the provisions of the Longshoremen's and Harbor Workers' Compensation Act "in respect to the injury or death of an employee of an employer carrying on any employment in the District of Columbia."

> "Sec. 2. This Act shall not apply in respect to the injury or death of (1) a master or member of a crew of any vessel; (2) *an employee of a common carrier by railway when engaged in interstate or foreign commerce or commerce solely within the District of Columbia;* (3) an employee subject to the provisions of the Act entitled 'An Act to provide compensation for employees of the United States suffering injuries while in the performance of their duties, and for other purposes, * * *'; and (4) an employee engaged in agriculture, domestic service, or any employment that is casual and not in the usual course of the trade, business, occupation, or profession of the employer." (Italics ours.)

Both the Act of March 4, 1927, and the Act of May 17, 1928, are broad enough in language to cover the petitioner, if no express exception is made. To exclude employees of common carriers engaged in certain kinds of commerce Congress made express exception in the latter Act. If the language in the former Act is broad enough to cover such employees it makes no difference how much broader the language is of the latter Act. Their express exclusion is most significant. Congress extended "this accepted principle of compensation" to certain workers injured on land in the District of Columbia who were "waiting upon Congress for the measure of social justice which has elsewhere been almost universally adopted" (70th Cong., 1st Sess., Senate Report No. 852, April 20, 1928; and House Report No. 1357, April 21, 1928).

Furthermore, by reason of the broad coverage if railroad employees had not been expressly excepted they would have lost their rights under the Federal Employers' Liability Act when injured on land.

> "* * * the later acts should also be regarded as legislative interpretations of the prior ones." *Cope* v. *Cope,* 137 U. S. 682, 688.

POINT III

The interpretation adopted promotes uniformity and provides for all classes.

By confusion of thought petitioner raises a confusion in rights and remedies. Seemingly it runs this way: if the fact he was injured on navigable water removes him from the

Federal Employers' Liability Act then other classes of railroad employees engaged in interstate commerce are removed; locality of the accident is the sole test; all railroad employees injured on navigable waters are in the same position as petitioner (petitioner's brief, pp. 19, 20). Then comes the conclusion that because of the judgment all railroad employees injured while working on navigable waters are deprived of the Federal Employers' Liability Act, the Safety Appliance Act, the Boiler Inspection Act (petitioner's brief, pp. 20-22).

We think that mere locus of the accident does not necessarily determine the right. At one stage petitioner evidently thought maritime employment had something to do with the case (petitioner's brief, p. 6). *Cope* v. *Vallette Dry-Dock Co.*, 16 Fed. 924 (E. D. Louisiana, 1883), aff'd 119 U. S. 625, shows that a service is not necessarily maritime because rendered upon the high seas or a navigable river. Sec. 2 (4) of the Act refers to maritime employment. In *Gt. Lakes Co.* v. *Kierejewski, supra,* not only was the tort committed and effective on navigable waters, but the rights and liabilities of the parties were matters which had direct relation to navigation and commerce (see petitioner's brief, p. 20).

For some not very clear reason petitioner cites *Chicago, G. W. R. R.* v. *Schendel,* 267 U. S. 287, which held that the use, movement or hauling of a car, within the meaning of the Safety Appliance Act, had not ended when a brakeman went between it and the next car to detach the chain and was injured by the movement of the car by gravity as the engine was cut off (petitioner's brief, p. 21). Both *Baltimore & Ohio R. R. Co.* v. *Groeger,* 266 U. S. 521, and *Great*

Northern Ry. Co. v. *Donaldson*, 246 U. S. 121, involved the application of the Federal Boiler Inspection Act of February 17, 1911, Sec. 2, 36 Stat. 913, and the former case also the amendment of March 4, 1915, 38 Stat. 1192, to engineers killed by boiler explosions (petitioner's brief, p. 21).

Probably a brakeman, conductor or engineer moving cars onto a float is not engaged in maritime employment although the determination is not necessary to this case and the problem was expressly passed by the Circuit Court of Appeals (R. 61). In this connection Opinion No. 29 of January 20, 1928, approved by the United States Employees' Compensation Commission, is of interest. It reads in part as follows:

> "The loading of a vessel by pushing loaded or empty cars on board a car ferry by means of a locomotive does not appear to differ from the work of loading such vessel by means of a large automobile truck or a smaller electric truck which carries onto the vessel a load to fill or partly fill a car. The work of the engineman operating the locomotive when it does run on board the vessel has the same maritime characteristics as the work of the truck operator who may operate one truck or a string of trucks on and off a vessel, loading or unloading cargo.
>
> "The trainmen and switchmen who ride railroad cars, couple or uncouple them, set or release the brakes on the cars while they are on board a vessel, work directly in connection with the loading or unloading of such vessel and can be considered in no different category than that of the ordinary longshoreman doing similar work on a smaller scale.
>
> "The only question involved is whether the Federal employers' liability act providing a remedy for

the employee engaged in interstate commerce is exclusive and in no way modified by the longshoremen's and harbor workers' compensation act. It is evident from the discussion at the hearings held prior to the passage of the latter act that it was the understanding of all concerned that its passage in the form in which it was considered would have modified the rights of seamen who had previously been given the benefits of the Federal employers' liability act applicable to interstate commerce employees. The seamen would not agree to accept the longshoremen's bill if applicable to seamen unless the rights to be given therein were entirely in addition to any rights which they might have under the laws then in effect, including the rights under the Federal employer's liability act.

"Section 5 of the longshoremen's act provides that 'the liability of an employer prescribed in section 4 shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, or anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death.' The right of an interstate commerce employee to compensation under the Federal employers' liability act to recover damages is a right enforceable 'at law' and the wording of this section appears to be sufficiently broad, so far as it is applicable, to modify or supersede the provisions of the Federal employers' liability act. * * *

"It is concluded that employees of a railroad company who go aboard vessels and render services in connection with putting on board, or taking off loaded or empty cars are engaged in maritime employment; that these same employees who sustain injuries while employed in their regular employment on land are not covered by the longshoremen's act,

but are covered either by Federal or State laws; * * *" (pp. 42-44).

Petitioner is much concerned because, under the interpretation made, certain railroad employees, engaged in interstate commerce, are given the benefits of the Act and deprived of previous rights under the Federal Employers' Liability Act and certain safety provisions (petitioner's brief, pp. 20-22). This same concern should run to longshoremen of all classes who came under the Federal Employers' Liability Act as a result of the Merchant Marine Act incorporation.

"Congress has apparently expressed an intention to remove such persons from the operation of the earlier act as thus construed by the Supreme Court, and to place them under the later act." *Obrecht-Lynch Corporation* v. *Clark*, 30 Fed. (2d) 144, 146, 147. Moreover, in the Congressional view of the situation, any sacrifice of rights under liability statutes was made to attain a greater gain, the gain represented by one of the most liberal compensation remedies ever enacted in this country.

There is no doubt but that repeals by implication are not favored by the courts (petitioner's brief, pp. 23, 24). But there is repeal by implication when one statute is clearly repugnant to another, is absolutely irreconcilable, when effect cannot be given to both, according to the very cases cited by petitioner. We submit that the Act operates as a repeal, to the extent necessary, of the earlier Federal Employers' Liability Act. The Act is exclusive of all other liability, including actions at law or in admiralty (§5). The Act repeals in part the application of the Merchant

Marine Act, not expressly but by implication, and by so doing repeals in part the application of the Federal Employers' Liability Act. In this connection the interpretation of the Suits in Admiralty Act, Act of Congress of March 9, 1920, c. 95, 41 Stat. 525, is of interest. We refer to *Eastern Transp. Co.* v. *United States,* 272 U. S. 675; *Fleet Corp.* v. *Rosenberg Brothers,* 276 U. S. 202; and *Federal Sugar Refining Co.* v. *United States,* 30 Fed. (2d) 254 (C. C. A. 2nd, 1929), certiorari denied 49 S. Ct. 352. In those cases there was a presumption against the suability of the United States, that a Court should not enlarge the liability of the United States beyond what the language required, that the express purpose of the Suits in Admiralty Act was merely to create a substitute for a suit in rem. The Courts looked at the broad provisions of the Act and the legislative history.

Circuit Judge Swan points out that the "adoption of the plaintiff's interpretation would drive us to the absurd result that a railroad employee loading intrastate freight upon a car float would also be excluded, and thus left without any statutory remedy" (R. 61). Such a case would not come under the Federal Employers' Liability Act, nor the Merchant Marine Act. Under the interpretation urged by petitioner uniformity would be lost by diverse state compensation laws under the principles laid down in *Industrial Comm.* v. *Nordenholt Co., supra,* and *Grant Smith-Porter Co.* v. *Rohde, supra.* As a practical matter there would be little occasion for the application of the Safety Appliance Acts and the Federal Locomotive Boiler Inspection Act.

We have here involved not the paramount authority of Congress to the exclusion of state regulation, the situation

obtaining in *Texas & Pacific Ry.* v. *Rigsby,* 241 U. S. 33, but two statutes of Congress passed under the authority of distinct Constitutional grants—Art. I, §8, par. 18, Art. III, §2 and Art. I, §8, par. 3. No sanctity attaches to these statutory rights and even Messel, a boilermaker's helper, would now be under the Act. *Messel* v. *Foundation Co.,* 274 U. S. 427. All longshoremen injured on navigable waters are now under the Act. No reason exists for treating longshoremen of railroad companies differently from longshoremen of steamship companies. The interpretation given recognizes the characteristic features and uniformity of the general maritime law. *London Guarantee & A. Co.* v. *Industrial Acci. Com., supra.*

CONCLUSION

We conclude that the District Court and the Circuit Court of Appeals have applied plain words to a plain situation, have carried out the intent of Congress, have made the only possible decision that means uniformity and justice to all, have substituted a certain remedy for the gamble of litigation, in line with the modern concept of responsibility arising out of status. We respectfully submit that the judgment should be affirmed.

JOHN M. GIBBONS,
Counsel for The New York, New Haven and Hartford Railroad Company.

EDWARD R. BRUMLEY,
FLEMING JAMES, JR.,
EDMUND J. MOORE,
Of Counsel.

APPENDIX A

Pertinent provisions of the Longshoremen's and Harbor Workers' Compensation Act, Act of March 4, 1927, c. 509, 44 Stat. 1424.

An Act to provide compensation for disability or death resulting from injury to employees in certain maritime employments, and for other purposes.

SHORT TITLE

SECTION 1. This Act may be cited as "Longshoremen's and Harbor Workers' Compensation Act."

DEFINITIONS

SEC. 2. When used in this Act—

(1) The term "person" means individual, partnership, corporation, or association.

(2) The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

(3) The term "employee" does not include a master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

(4) The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable

waters of the United States (including any dry dock).

(5) The term "carrier" means any person or fund authorized under section 32 to insure under this Act and includes self-insurers.

(6) The term "commission" means the United States Employees' Compensation Commission.

(7) The term "deputy commissioner" means the deputy commissioner having jurisdiction in respect of an injury or death.

(8) The term "State" includes a Territory and the District of Columbia.

(9) The term "United States" when used in a geographical sense means the several States and Territories and the District of Columbia, including the territorial waters thereof.

(10) "Disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.

(11) "Death" as a basis for a right to compensation means only death resulting from an injury.

(12) "Compensation" means the money allowance payable to an employee or to his dependents as provided for in this Act, and includes funeral benefits provided therein.

(13) "Wages" means the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the injury, including the reasonable value of board, rent, housing, lodging, or similar advantage received from the employer, and gratuities received in the course of employment from others than the employer.

(14) "Child" shall include a posthumous child, a child legally adopted prior to the injury of the employee, and a stepchild or acknowledged illegitimate child dependent upon the deceased, but does not include married children unless wholly dependent on him. "Grandchild" means a child as above defined of a child as above defined. "Brother" and "sister" include stepbrothers and stepsisters, half brothers and half sisters, and brothers and sisters by adoption, but does not include married brothers nor married sisters unless wholly dependent on the employee. "Child," "grandchild," "brother," and "sister" include only persons who at the time of the death of the deceased employee are under eighteen years of age.

(15) The term "parent" includes step-parents and parents by adoption, parents-in-law, and any person who for more than three years prior to the death of the deceased employee stood in the place of a parent to him, if dependent on the injured employee.

(16) The term "widow" includes only the decedent's wife living with or dependent for support upon him at the time of his death; or living apart for justifiable cause or by reason of his desertion at such time.

(17) The term "widower" includes only the decedent's husband who at the time of her death lived with her and was dependent for support upon her.

(18) The terms "adoption" or "adopted" mean legal adoption prior to the time of the injury.

(19) The singular includes the plural and the masculine includes the feminine and neuter.

COVERAGE

SEC. 3. (a) Compensation shall be payable under this Act in respect of disability or death of an em-

ployee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. No compensation shall be payable in respect of the disability or death of—

(1) A master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; or

(2) An officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof.

(b) No compensation shall be payable if the injury was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another.

LIABILITY FOR COMPENSATION

SEC. 4. (a) Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 7, 8, and 9. In the case of an employer who is a subcontractor, the contractor shall be liable for and shall secure the payment of such compensation to employees of the subcontractor unless the subcontractor has secured such payment.

(b) Compensation shall be payable irrespective of fault as a cause for the injury.

EXCLUSIVENESS OF LIABILITY

SEC. 5. The liability of an employer prescribed in section 4 shall be exclusive and in place of all other liability of such employer to the employee, his legal

representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this Act, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this Act, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee.

TIME FOR COMMENCEMENT OF COMPENSATION

SEC. 6 (a) No compensation shall be allowed for the first seven days of the disability, except the benefits provided for in section 7: *Provided, however,* That in case the injury results in disability of more that forty-nine days, the compensation shall be allowed from the date of the disability.

(b) Compensation for disability shall not exceed $25 per week nor be less than $8 per week: *Provided, however,* That if the employee's wages at the time of injury are less than $8 per week he shall receive his full weekly wages.

* * * * *

PRESUMPTIONS

SEC. 20. In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary—

(a) That the claim comes within the provisions of this Act.

(b) That sufficient notice of such claim has been given.

(c) That the injury was not occasioned solely by the intoxication of the injured employee.

(d) That the injury was not occasioned by the willful intention of the injured employee to injure or kill himself or another.

INVESTIGATIONS BY THE COMMISSION

SEC. 41 (a) The commission shall make studies and investigations with respect to safety provisions and the causes of injuries in employments covered by this Act, and shall from time to time make to Congress and to employers and carriers such recommendations as it may deem proper as to the best means of preventing such injuries.

(b) In making such studies and investigations the commission is authorized (1) to cooperate with any agency of the United States charged with the duty of enforcing any law securing safety against injury in any employment covered by this Act, or with any State agency, engaged in enforcing any laws to assure safety for employees, and (2) to permit any such agency to have access to the records of the commission. In carrying out the provisions of this section the commission or any officer or employee of the commission is authorized to enter at any reasonable time upon any premises, tracks, wharf, dock, or other landing place, or upon any vessel, or to enter any building, where an employment covered by this Act is being carried on, and to examine any tool, appliance, or machinery used in such employment.

APPENDIX B

ACT OF MAY 17, 1928, C. 612, 45 STAT. 600

Application of chapter to District of Columbia—Act May 17, 1928, c. 612, 45 Stat. 600, entitled "An Act to provide compensation for disability or death resulting from injury to employees in certain employments in the District of Columbia, and for other purposes," provides as follows:

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the provisions of the Act entitled "Longshoremen's and Harbor Workers' Compensation Act," approved March 4, 1927, including all amendments that may hereafter be made thereto, shall apply in respect to the injury or death of an employee of an employer carrying on any employment in the District of Columbia, irrespective of the place where the injury or death occurs; except that in applying such provisions the term "employer" shall be held to mean every person carrying on any employment in the District of Columbia, and the term "employee" shall be held to mean every employee of any such person.
>
> SEC. 2. This Act shall not apply in respect to the injury or death of (1) a master or member of a crew of any vessel; (2) an employee of a common carrier by railroad when engaged in interstate or foreign commerce or commerce solely within the District of Columbia; (3) an employee subject to the provisions of the Act entitled "An Act to provide compensation for employees of the United States suffering injuries while in the performance of their duties, and for other purposes," approved September 7, 1916, as amended; and (4) an employee engaged in agricul-

ture, domestic service, or any employment that is casual and not in the usual course of the trade, business, occupation, or profession of the employer.

SEC. 3. This Act shall take effect July 1, 1928.

APPENDIX C

THE FEDERAL EMPLOYERS' LIABILITY ACT OF 1908

Act of April 22, 1908, c. 149, §1, 35 Stat. 65:

An Act relating to the liability of common carriers by railroad to their employees in certain cases.

SECTION 1. Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

APPENDIX D

THE MERCHANT MARINE ACT OF 1920

Act of March 4, 1915, c. 153, §20, 38 Stat. 1185, as amended by Act of June 5, 1920, c. 250, §33, 41 Stat. 1007:

> Recovery for injury to or death of seaman. Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

APPENDIX E

Senate Report No. 973, 69th Congress, First Session, June 2, 1926.

(Report to accompany S. 3170)

The Judiciary Committee, having had under consideration the bill S. 3170, recommends that the bill do pass with the following amendment:

Strike out all after the enacting clause and insert the following:

(Bill inserted here)

The purpose of this bill is to provide for compensation, in the stead of liability, for a class of employees commonly known as "longshoremen." These men are mainly employed in loading, unloading, refitting and repairing ships; but it should be remarked that injuries occurring in loading or unloading are not covered unless they occur on the ship or between the wharf and the ship so as to bring them within the maritime jurisdiction of the United States. There are in the neighborhood of 300,000 men so employed in the entire country.

The committee deems it unnecessary to comment upon the modern change in the relation between employers and employees establishing systems of compensation as distinguished from liability. Nearly every State in the Union has a compensation law through which employees are compensated for injuries occurring in the course of their employment without regard to negligence on the part of the employer or contributory negligence on the part of the employee. If longshoremen could avail themselves of the benefits of State compensation laws, there would be no occasion for this legislation; but, unfortunately, they are excluded from these laws by reason of the character of their employment; and they are not only excluded but the Supreme Court has more than once held that Federal legislation cannot, constitutionally, be enacted that will apply State laws to this occupation. (*Southern Pacific Company* v. *Jensen*, 244 U. S. 205; *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149; *Washington* v. *Dawson & Co.*, 264 U. S. 219.)

It thus appears that there is no way of giving to these hardworking men, engaged in a somewhat hazardous employment, the justice involved in the modern principle of compensation without enacting a uniform compensation statute.

II. It will be remembered that in 1916 Congress passed a Federal compensation law applicable to Government employees. It is administered by a commission of three members. In order to save the expense of an independent establishment, this bill provides that the law shall be administered by the Federal compensation commission and through deputy commissioners appointed by the commission in such places as convenience may require.

III. Sec. (3) of the bill describes the persons to be brought within its terms with such exceptions as are necessary to limit the operation of the bill to the very persons who are intended to be covered by it.

Sections (4), (5), and (6) of the bill contain the appropriate provisions for making certain that the compensation will be paid, abolishing liability on the part of the employer except for the payment of the prescribed compensation, and fixing the time at which compensation begins.

IV. The bill as originally introduced contained a complete scale of compensation and for the distribution of benefits in the event of death. Upon the most careful consideration, the committee finally concluded that instead of prescribing an independent scale of compensation, it would be more equitable to adopt the rate of compensation provided for in the Federal compensation law; first, because the Fed-

eral commission is familiar with the administration of this law and there would be greater certainty of findings and decisions, and second, because Congress is fairly familiar with the workings of the present Federal law and the passage of this much needed act would be facilitated.

V. The remainder of the bill is almost entirely administrative and it is not thought necessary to take up these provisions in detail. The greatest care has been observed in making all its parts harmonious and consistent, and these administrative features can easily be explained when the bill comes before the Senate for consideration.

APPENDIX F

House Report No. 1767, 69th Congress. (Report to accompany S. 3170.)

The Committee on the Judiciary to whom was referred Senate bill 3170, after hearings (ser. 16, pt. 2) and consideration, reports the same favorably with amendments, and recommends that the bill as amended do pass.

The committee amendments are as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

(Bill inserted here)

The Senate bill as reported by the committee will provide the benefits of workmen's compensation to practically

all maritime workers within the admiralty jurisdiction. Workmen's compensation has come to be universally recognized as a necessity in the interest of social justice between employer and employee. It is the modern substitute for the old common law remedy afforded through actions at law for damages, and promptly affords relief to the injured employee by furnishing medical attendance and supplies immediately upon the occurrence of the injury or as soon thereafter as possible and compensation during the period of his illness or inability to pursue his usual employment, and in case of death, financial assistance to his dependents, without the delay and expense which an action at law entails.

Congressional action is necessary owing to the provisions of the Constitution of the United States.

Article 3, section 2, of the Constitution provides that the judicial power of the United States shall extend "to all cases of admiralty and maritime jurisdiction," and article I, section 8, confers upon Congress power "to make all laws which may be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States or in any department or officer thereof."

The Supreme Court has held that these provisions of the Constitution grant to Congress "paramount power" to fix and determine the maritime law of the United States. (*Butler* v. *Boston and Savannah S. S. Co.*, 130 U. S. 527; *In re Garnett*, 141 U. S. 1, 14.)

The Senate bill as reported by the committee has been amended so as to make it conform substantially to the bill

reported to the House by the Judiciary Committee on May 13, 1926. (H. R. 12063, H. Rept. 1190.)

The bill has also been amended so as to provide the benefits of compensation to seamen, or, to use the language of the bill, "to masters and members of the crew." As to this class of workers, the bill provides that they are to receive compensation, in addition to their right to maintenance and cure, and wages to the end of the voyage as now provided by maritime law.

The principle of workmen's compensation has become so firmly established that simple justice would seem to require that this class of maritime workers should be included in this legislation. Owing to the peculiar nature and hazards of this employment, however, it is not felt that their ancient rights of maintenance and cure and wages should be disturbed. The situation is met, however, by leaving these rights with the seamen and granting them in addition the benefits of workmen's compensation with a proviso that they shall not receive medical services and supplies when they are receiving the equivalent thereof as cure, and that the amount paid to injured seamen as wages shall be credited against any amount due injured seamen as compensation.

In December, 1926, a bill was introduced in the Senate to provide workmen's compensation for seamen, and this committee has on file petitions signed by over 5,000 seamen requesting that they be included in this bill.

The bill as amended, therefore, will enable Congress to discharge its obligation to the maritime workers placed

under their jurisdiction by the Constitution of the United States by providing for them a law whereby they may receive the benefits of workmen's compensation and thus afford them the same remedies that have been provided by legislation for those killed or injured in the course of their employment in nearly every State in the Union.

SUPREME COURT OF THE UNITED STATES.

No. 248.—October Term, 1929.

Victorio Nogueira, Petitioner, vs. The New York, New Haven & Hartford Railroad Company.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[April 14, 1930.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

In this action, brought in the District Court of the United States under the Federal Employers' Liability Act, the complaint was dismissed upon the ground that the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, was applicable and afforded an exclusive remedy. (c. 509, 44 Stat. 1424; U. S. C. Tit. 33, secs. 901-950). The judgment was affirmed by the Circuit Court of Appeals, 32 Fed. (2d) 179.

The petitioner was injured on a car float of five hundred tons belonging to the defendant railroad company. The float was a vessel used in the transportation of railroad cars and at the time of the injury was lying in navigable waters at pier 42, East River, New York harbor. The petitioner was employed by the railroad company as one of a gang of freight handlers in loading freight into cars on the float. He was using a hand truck in carrying a bale of paper, a piece of interstate freight, and, as the float was several feet lower than the dock, it was necessary to move the bale over a plank which ran from the dock to the middle of the float at a steep incline. Several men were assigned to help the petitioner in order to control the movement of the bale by handhooks. The petitioner was in front of the truck holding its handles and alleged that by the negligence of the other men, who failed to hold the bale properly, it got out of control and skidded down the plank, throwing the petitioner on the floor of the float and crushing his leg.

The contention is that the car float was used as an adjunct to railroad transportation in interstate commerce, and that it was

not the intention of Congress to substitute the remedy under the Longshoremen's and Harbor Workers' Compensation Act for that afforded by the Federal Employers' Liability Act. The Circuit Court of Appeals assumed that the petitioner would have been entitled to prosecute his claim under the Federal Employers' Liability Act if the later act did not apply. If the latter was applicable the remedy thereunder was made exclusive by the explicit provision of section 5. 44 Stat. p. 1426; U. S. C., Tit. 33, sec. 905.[1]

The general scheme of the Longshoremen's and Harbor Workers' Compensation Act was to provide compensation to employees engaged in maritime employment, except as stated, for disability or death resulting from injury occurring upon the navigable waters of the United States where recovery through workmen's compensation proceedings might not validly be provided by state law. Employers are bound to secure the payment of the prescribed benefits to those of their employees whose employment is covered by the act, and this compensation is to be payable irrespective of fault as a cause of the injury.

Employers are thus defined in section 2, subdivision (4) (44 Stat. 1425, U. S. C. Tit. 33, sec. 902): "The term 'employer' means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry dock)". The term is not defined otherwise, with respect either to the nature or the scope of the enterprises in which the employer is engaged. The definition is manifestly broad enough to embrace a railroad company, provided it has employees who "are employed in maritime employment, in whole or in part, upon the navigable waters of the United States."

[1]Section 5 provides: "The liability of an employer prescribed in Section 4 shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this Act, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this Act, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee".

The employees subject to the act are not defined affirmatively, but section 2, subdivision (3) (*id.*) contains the following limitation: "The term 'employee' does not include a master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net". In this instance, the petitioner was not the master or member of the crew of the vessel, and the vessel was not under eighteen tons.

The 'coverage' of the act is stated in section 3, subdivision (a) (44 Stat. 1426, U. S. C. Tit. 33, sec. 903):

"Sec. 3. (a) Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law".

In *Atlantic Transport Company* v. *Imbrovek*, 234 U. S. 52, the libelant was engaged as a stevedore in loading a ship lying in port in navigable waters. The court had no doubt that he was performing a maritime service and that the rights and liabilities of the parties were matters within the admiralty jurisdiction. In *Southern Pacific Company* v. *Jensen*, 244 U. S. 205, the Southern Pacific Company, a common carrier by railroad in interstate commerce, also operated a steamship between New York and Galveston. Jensen, an employee of the company, was killed while he was engaged in unloading the ship which was berthed at a pier in the North River, New York harbor. He was operating a small electric freight truck which he drove out of the vessel upon a gang plank running to the pier. The Court of Appeals of New York held that the Workmen's Compensation Act of the State applied to his employment and that the statute was not obnoxious to the Federal Constitution. In this Court, two questions were presented, first, whether the Federal Employers' Liability Act was applicable and hence the state statute could not control; and, second, whether the Workmen's Compensation Act of the State conflicted with the general maritime law which constitutes an integral part of the Federal law under Article III, section 2, of the Federal Constitution. Concluding that the case was not within the Federal Employers' Liability Act, as the ship could not properly be regarded as a part of the railroad's extension or equipment, the Court took up the second question and decided that the New York Work-

men's Compensation Act could not constitutionally govern the case of one injured upon navigable waters while engaged in maritime service. It was said that the state statute attempted to give a remedy unknown to the common law, incapable of enforcement by the ordinary proceedings of any Court, and was not saved to suitors from the constitutional grant of exclusive jurisdiction to the Federal District Courts.

In *State Industrial Commission* v. *Nordenholt Corporation*, 259 U. S. 263, a longshoreman was injured on a dock while engaged in unloading a vessel. It was decided that in such a case, where the injury took plaec on an extension of the land, the maritime law did not prescribe the liability and the local law had always governed. The Workmen's Compensation Law of the State was accordingly held to be applicable. The distinction was thus maintained between injuries on land and those which were suffered by persons engaged in maritime employment on a vessel in navigable waters.

From the standpoint of maritime employment, it obviously makes no difference whether the freight is placed in the hold or on the deck of a vessel, or whether the vessel is a car float or a steamship. A car float in navigable waters is subject to the maritime law like any other vessel. The injury caused to petitioner in this case is thus as much within the exclusive admiralty and maritime jurisdiction as was that of the employee in *Southern Pacific Company* v. *Jensen, supra,* and recovery for the injury "through workmen's compensation proceedings" could not "validly be provided by state law".

As the present case falls directly within the affirmative provisions of Section 3 of the Longshoremen's and Harbor Workers' Compensation Act, we look next to the cases specially excepted. Section 3, after the provision quoted above, continues:

"No compensation shall be payable in respect of the disability or death of—

"(1) A master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; or

"(2) An officer or employee of the United States or any agency thereof, or of any State or foreign government, or of any political subdivision thereof."

The case of the petitioner does not come within any of these exceptions. Their limited character is significant. No exception is

made of the employees of a railroad company employed in maritime service on the navigable waters of the United States or with respect to the question whether such employment was in connection with an extension of railroad transportation. As to the master and crew of a vessel, it should be noted that section 33 of the Merchant Marine Act, 1920 (c. 250, 41 Stat. 988, 1007), gave to seamen the rights and remedies under all statutes of the United States which were applicable to railway employees in cases of personal injury, thus carrying to seamen the benefit of the provisions of the Federal Employers' Liability Act. *Panama Railroad Company* v. *Johnson*, 264 U. S. 375; *Engel* v. *Davenport*, 271 U. S. 33. Longshoremen engaged on a vessel at dock in navigable waters, in the work of loading or unloading, have been held to be seamen. *International Stevedoring Company* v. *Haverty*, 272 U. S. 50; *Northern Coal Company* v. *Strand*, 278 U. S. 142. But seamen, including longshoremen engaged in loading or unloading, if injured on a vessel in navigable waters, could not constitutionally have the benefit of a state workmen's compensation act, even if an act of Congress so provided. After the decision in *Southern Pacific Company* v. *Jensen*, *supra*, Congress amended clause three of section 24 and clause three of section 256 of the Judicial Code relating to cases of admiralty and maritime jurisdiction, by adding to the clause saving to suitors common law remedies the words "and to claimants the rights and remedies under the workmen's compensation law of any State" (Act of October 6, 1917, c. 97, 40 Stat. 395). In *Knickerbocker Ice Company* v. *Stewart*, 253 U. S. 149, this Court held that the attempted amendment was unconstitutional as being an unwarranted delegation of the legislative power of Congress and as destroying the uniformity which the Constitution had established and thus defeating the constitutional grant of jurisdiction to the Federal Courts. By the Act of June 10, 1922 (c. 216, 42 Stat. 634), Congress again amended clause three of section 24 and clause three of section 256 of the Judicial Code. There was added to the saving clause the words "and to claimants for compensation for injuries to or death of persons other than the master or members of the crew of a vessel their rights and remedies under the workmen's compensation law of any State, District, Territory, or possession of the United States, which rights and remedies when conferred by such law shall be exclusive." This Court decided that the exception of the master and crew of a vessel was insufficient to

meet the objections which had been pointed out and the amendment was held to be unconstitutional. *Washington* v. *Dawson & Company*, 264 U. S. 219.

When the bill which became the Longshoremen's and Harbor Workers' Compensation Act was pending in Congress, the importance of the policy of compensation acts, and their advantages in providing for appropriate compensation in the case of injury or death of employees without regard to the fault of the employer, were distinctly recognized. It appears that the bill originally excluded a master or members of a crew of a vessel, but was amended so as to extend to them the benefits of compensation (House Rep. No. 1767, 69th Cong., 2d sess.). As these seamen preferred to remain outside of the provisions of the bill, they were finally excluded and the bill was passed with the exceptions above-quoted. (Cong. Rec., 69th Cong., 2d. sess., vol. 68, pt. 5, p. 5908.) There was no exclusion of stevedores or of those sustaining injuries upon navigable waters in loading or unloading a vessel unless it was under eighteen tons net. The application of the act in such cases was explicitly made to depend upon the question whether the injury occurred upon navigable waters and recovery therefor could not validly be provided by a state compensation statute.

The bill, as reported to, and first passed by, the Senate, contained a provision in section 3 excepting "an employee of a common carrier by railroad engaged in interstate or foreign commerce or in commerce within any Territory or the District of Columbia if the injury from which the disability or death results occurred while the employee was employed in such commerce." (Sen. Rep. No. 973, 69th Cong., 1st sess.) This exception was eliminated from the bill as finally passed.

It is hardly necessary to go further, as the clear and constitutional requirements of the act of Congress in the furtherance of the policy conceived to be in the interest of employees can not be escaped by any permissible process of construction. For the opposing view it is said that repeals by implication are not favored. But it is not a case of resort to implication. The act expressly provides that liability thereunder "shall be exclusive and in place of all other liability of such employer to the employee, his legal representative . . . at law or in admiralty." It is further provided that if the employer in the case of the described employees

engaged in maritime employment does not give the required compensation, the employee or his legal representative can maintain an action at law for damages, and in such an action, not only are the defenses of contributory negligence and the negligence of a fellow servant excluded, but also that of assumption of risk, a defense which is still open under the Federal Employers' Liability Act save in specified cases. *Seaboard Air Line Railway* v. *Horton*, 233 U. S. 492; *Pryor* v. *Williams*, 254 U. S. 43. Not only is the payment of compensation under the act a bar to recovery at law but, if the compensation is not given, the remedy then available at law has its special incidents.

Nor is there anything of substance added to the argument for the petitioner by reference to the possible effect on the application of other laws in cases which come within the purview of the Longshoremen's and Harbor Workers' Compensation Act, for the question still is to what cases does that act apply according to its terms. The fact that the same employee of a railroad company may have different rights at different times is a familiar consequence of the application of different laws, as, for example, when the employee of a railroad company is engaged at one time in intrastate commerce and at another time, even on the same day, in interstate commerce; and the application of Federal laws where the employment falls within the Federal jurisdiction is manifestly a matter within the discretion of Congress. *Panama Railroad Company* v. *Johnson, supra.* In the present instance, had the petitioner been engaged in intrastate commerce, his case still would have been within the maritime jurisdiction of the Federal courts, and he would have been denied the benefit of the state compensation law. See *London Guarantee & Accident Company* v. *Industrial Accident Commission*, 279 U. S. 109. In these circumstances Congress dealt with the maritime employment of longshoremen whose injuries sustained on navigable waters would fall within the exclusive maritime jurisdiction, without regard to the distinction between intrastate and interstate transportation.

It is also pointed out that in the Act of May 17, 1928 (c. 612, 45 Stat. 600), applying the provisions of the Longshoremen's and Harbor Workers' Compensation Act to employees in the District of Columbia, a special exception was added of the case of an employee of a common carrier by railroad when engaged in interstate

or foreign commerce or commerce solely within the District of Columbia. The fact that a similar exception was left out of the Longshoremen's and Harbor Workers' Compensation Act and was inserted in the later statute works against, rather than for, the petitioner's contention.

Judgment affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.